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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
STATE OF MISSOURI, at the relation and to the use of CHRIS. GOTTLIEB, Collector of the Revenue for Jackson County, Missouri,
Defendant in Error.

No. 256.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

ELENEIOUS SMITH,
ALEXANDER NEW,
For Plaintiff in Error.

JOHN F. DILLON,
HENRY D. ESTABROOK,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, vs. STATE OF MISSOURI, at the relation and to the use of CHRIS. GOTTLIEB, Collector of the Revenue for Jackson County, Missouri, Defendant in Error.	No. 256.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Statement, assignment of errors, points and authorities, and argument for plaintiff in error, the Western Union Telegraph Company.

STATEMENT OF CASE.

THIS IS AN ACTION AT LAW originally brought by the Collector of the Revenue for Jackson County, Missouri, in the Circuit Court of Jackson County, Missouri,

against the Western Union Telegraph Company, to recover the sum of $1,027.22, the amount of taxes assessed by the State Board of Equalization for the year 1889 against the Western Union Telegraph Company apportioned to Jackson County, Missouri.

Rec., pp. 6–7.

THE ANSWER of defendant was,

FIRST, a general issue as to the legality of the tax assessed and levied against the property of defendant.

Rec., p. 7.

SECONDLY, as a separate defense, the company pleaded that it presented to the State Board of Equalization a sworn return showing the true value of its property in Missouri on the 1st of June, 1898, and particularly in Jackson County, Missouri, and further pleaded that outside of its general plant, consisting of poles, wires, instruments and batteries, it had in Jackson County other property, such as furniture, fixtures, etc., of the value of $1,000, *the taxes upon which latter sum had been assessed and paid.* That, as required by law, said board proceeded to determine the value of defendant's property in Missouri, and defendant, through its agents, offered before the said board to prove that the fair aggregate value of all of its property in Missouri on June 1st, 1898, was the sum of $541,472.40. That the board, ignoring the sworn return, did thereafter value said property under the classification of poles, wires and instruments and "all other property" at an aggregate of $1,827,727.45; the item "all other property" being the sum of $856,400.56. That the aggregate of the sums assessed

on account of poles, wires and instruments was sufficient to have produced a complete and entirely *new system* in the State of Missouri on the 1st of June, 1898. That said board, with a full knowledge of the true value of said poles, wires and instruments, did, with the intent to injure defendant by compelling it to pay an excessive and disproportionate share of State and local taxes, fix said valuation at more than the true and actual value of said property. That under the law it was the duty of the board to adjust and equalize the valuation of all real and personal property in Missouri among the several counties in the State, and that by a common arrangement, understanding and purpose among the members of the board, and in violation of the constitution and laws of the State of Missouri, and with intent to compel defendant to pay a greater proportion of taxes than those paid by the general owners of real and personal property in Missouri, said board did assess the real and personal property generally at from 35 to 40 per cent. of its true value, and the property of the defendant telegraph company at more than its full value.

That on June 1st, 1898, the telegraph company had no property in Missouri other than poles, wires and instruments, excepting certain furniture, fixtures and property of like character of a valuation not to exceed $5,000, $4,600 worth of which was located in the cities of St. Louis, Kansas City and St. Joseph, *and all locally assessed, and the taxes so assessed paid.* That in assessing "all other property" the board did intend to, and in fact did, assess the *franchises* of the defendant. That for the purpose of concealing the truth with respect to its assessment of defendant's franchises it designated the same as "all other property." That

the board was without power to assess such franchises, which were derived solely from the United States and the State of New York, and exercised, so far as the State of Missouri was concerned, by virtue solely of Federal grant. And that such an assessment was in violation of the Constitution and laws of the United States.

THIRDLY. Another defense set up was that defendant is engaged in maintaining lines of telegraph throughout the United States, and over and along the post-roads of the same, and across the navigable streams and waters of the United States, and that by virtue of its acceptance of the provisions of the Act of Congress of July 24th, 1866, it became a governmental agent and instrument of foreign and inter-state commerce exercising its rights as such in Missouri only in pursuance of the authority granted by Act of Congress. That the assessment made by the board of said item, "all other property," $856,400.56 was, in fact, an assessment solely on account of franchises granted defendant by the Constitution and laws of the United States, and that the board was without authority to assess or tax such franchises.

Rec., pp. 7, 8, 9, 10, 11, 12.

Subject to such objections as might be made in law, THE FOLLOWING STIPULATIONS were filed in the cause:

FIRST. That the tax book should be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899 against defendant, without proof by plaintiff of any of the steps leading up to its execu-

tion and issuance, but express reservation of the right on the part of the defendant to introduce any competent and relevant evidence to sustain the issues on its behalf.

Rec., p. 15.

It was also admitted, *first*, that the defendant since 1854 has been a corporation organized and existing under the laws of the State of New York. *Second*, that, as pleaded in the answer, it accepted the provisions of the Act of Congress of July 24th, 1866, and that said acceptance has not been withdrawn, and that defendant transmits telegrams for the Government between its departments and officers at rates fixed by the Postmaster General. *Third*, that defendant is not incorporated under the laws of the State of Missouri, and has never applied for or secured from the State a license authorizing it to do business within the State under the laws thereof.

Rec., p. 16.

A general objection was made by plaintiff in the lower Court to the introduction of any evidence by defendant for the reason that the finding and assessment of the State Board of Equalization was final and not subject to attack in this suit. Said objection was overruled, and exception noted.

Rec., pp. 16, 17.

The Evidence.

Alexander A. Lesueur, on behalf of the plaintiff in error, testified that he was Secretary of State of the State of Missouri and had held that office for eleven years. The witness was questioned with respect to

what was considered by the State Board in fixing the valuations hereinbefore referred to and as embodied in the resolution of the Board, which will be found on pages 30 and 31 of the record and testified as follows:

"Q. Well, it is true, is it not, as recited in the record of the Board, that in fixing this valuation the traffic and business of the company, the market and par value of its stocks and bonds and gross receipts and net earnings and franchises were considered? A. Those things that were mentioned in the record of the board as being considered were considered.

"Q. And I am right in saying, am I, in connection with that record, that the figures that you reached here were the result of that consideration? A. Unquestionably.

"Q. Then I again ask, am I not right in picking out the one element of franchises and saying that that was considered, no matter what sort of franchise it was, that was considered and entered into the assessment? A. That is stated in the record.

"Q. And it is a fact? A. It is a fact that it was considered as one of the elements" (Rec., p. 21).

* * * * * *

"Q. Well, then Captain, not being able to give either in figures or what proportion the amount at which franchises of this company were assessed, you do, however, know, as the record recites, that they were assessed at something and entered into this final figure that I have mentioned? A. That was stated in the record.

"Q. And that is a fact, is it not? A. I assume that it is.

"Q. I mean you, yourself, voted on some assessment of franchises, did you not? I ask for your individual action? A. I considered all those things that are stated in the record.

"Q. Yes, sir; and then you did consider franchises? A. That is one of the things stated in the record" (Rec., pp. 21, 22).

"Q. Captain, what do you mean and what is your understanding of the term 'franchises' as used in taxation by the State Board of Equalization? A. I do not undertake to say what definition is placed on franchise valuation by the State Board of Equalization. My own understanding of the term is that in regard to

quasi public corporations enjoying certain privileges granted by law *there is a value in addition to that of the tangible property.* The most feasible manner of arriving at an estimate of *this* valuation seems to be to ascertain the market value of the capitalization of the corporation, as a general rule, the market value of its shares of stocks and bonds, *and from this to deduct the valuation of the tangible property, real and personal, which is otherwise assessed.*"

"Q. And the difference between the valuation of the tangible property and the valuation of the entire property as above indicated is to be considered the franchise valuation? A. Yes, sir" (Rec., pp. 23, 24).

Interrogated with respect to the general rule which has prevailed in Missouri as to the assessment of real and personal property generally, he testified as follows:

"Q. Captain, I will ask you if you are familiar with the rule that has prevailed, if there has been one in our State, for many years, and particularly the eleven years that you have held the office of Secretary of State, with regard to the assessment of real and personal property throughout the State? A. I think so.

"Q. I mean its general assessment. A. I think so.

"Q. Captain, I will ask you if you are familiar with the rule existing in the State of Missouri with respect to the average proportion of actual value of real and personal property adopted by the assessing office as assessable value of such property for taxation purposes? A. I am familiar with the practice.

"Q. Well, that is what I want, practice or general custom. A. The first question that you asked me was as to a rule, and I can hardly answer that affirmatively for the reason that there are several. *The practice has grown up in Missouri for many years on the part of the assessors to return for assessment a portion only of the values of real and personal property.* The practice of the State Boards of Equalization has been to equalize these various valuations as between counties. It might appear on the face of this proceeding that the State Board was not literally complying with the law which requires assessments to be at real cash value. The

boards have endeavored to remedy this defect, which they considered an evil and in the way of true equalization, but without success. One important reason for failure being its inability at the proper time to secure from the General Assembly such reduction of levy which, accompanied with a doubling of the assessment, would have procured only sufficient revenue for the economical administration of the State government. It followed in a general way that properties which were subsequently assessed by the State Board of Equalization, *composing an original assessing board*, were in the main placed upon the same basis of valuation as had previously been the personal and real property of the State.

"Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the State well, say, during the past five years, for assessment of real and personal property? A. Well, I would reply to that, that taking personal property and real property altogether, outside of the city of St. Louis, the average valuation was about 40 per cent. (Rec., p. 22).

"Q. In other words, that outside of the city of St. Louis the taxes during the past five years, for illustration, would be assessed on a valuation that would be about 40 per cent. of the actual value of real and personal property? A. The State Board of Equalization has heard a great deal of evidence on this point, and that is my conclusion drawn from that evidence.

"Q. And what would the proportion be, Captain, stating as nearly as you can from your official knowledge, with respect to the city of St. Louis, which you excluded in your preceding answer? A. I would answer that question also in an explanatory way. Necessarily they state that they assess the property at a little higher valuation than collateral testimony shows it is assessed. I don't think that is a matter of bad faith or intentional misrepresentation, but simply grows out of the natural desire to approximate to the law as closely as possible. In the city of St. Louis the Assessor and Board of Assessors make the statement that their valuation is about seventy per cent. of the actual cash value of property. From other testimony and investigations made by the State Board of Equalization in years past and personal inquiry, my own opinion is that property in the city of St. Louis is

assessed at more nearly fifty per cent. of its actual cash value than the sum above stated.

"Q. Then, Captain, from your knowledge as an officer of the State Board of Equalization and your personal information, am I right in saying that it is your best judgment that during the past five or perhaps more years property throughout the State in the various counties and cities, other than the city of St. Louis, real and personal, has been assessed at about forty per cent of its actual cash value and in the city of St. Louis at about fifty per cent. of its actual cash value? A. That is my opinion" (Rec., p. 23).

EDWARD C. CROW, witness on behalf of the plaintiff in error, testified as follows:

"Q. Then, General, assuming, as I believe is the fact, that you did vote in favor of the entry that is here, the resolution or whatever it may be styled, your recollection is that the record properly sets forth the action on your part, as well as that of the others members? A. Why, I don't know whether we voted to assesss it at that figure or not. That purports to be a copy. I guess that copy is correct. We voted to increase that assessment; we did increase it very materially. We increased it over prior years; we did do that. But I will say this with reference to that record, that the record there of course only discloses the results of the findings of the board, and it does not purport to set forth all the details, the facts and the evidence which we have before us, which facts and evidence of course you will find reported very fully in the official records of the board, and as far as the others members of the board are concerned, I can't say what they considered in voting, which they did vote for the resolution, and in basing that value. I can only speak for myself, and in speaking for myself I did consider all those things in arriving at that value (Rec., p. 27).

"Q. There is an item which is not specific; of course we understand what poles and wires and instruments are, but there is one item in the assessment which the board made for that year under the heading 'All other property at $856,400.56,' and I will ask you, of course, as a matter of your own recollection, if you can tell us what from your standpoint was embraced in that item?

A. In reply to your question I would say that I could not now name what all was included in that item of ' all other property,' but *it occurs to me that there was other tangible property included in the item ' all other property,'* besides the enumerated items preceding this one in the schedule ; *for instance, desks and office furniture repairs and the various classes of property that I presume the company then had and now has, subject to taxation in this State.* I suppose also there was included in that *what is known as the intangible value of property, to-wit, the franchise value,* but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of ' all other property ' was valued at, I could not say.

" Q. General, are you able in your mind, even in the roughest way, to fix the proportion of the one to the other; I mean on any basis at all that you think would be about right? A. Not at this time. I would have to make the figures and look at the full record before me as it was then, and I don't know that even from that I could arrive at anything like an accurate conclusion.

" Q. Let me ask it in this way. Are you able from your memory to say whether or not the intangible property, such as franchise, constitutes a considerable part of this $856,400.56 without binding you to the proportion or figures? A. Without undertaking to be specific as to figures or as to proportional quantities, *I would say that in my opinion the intangible value of the property of the Western Union Company in this State constituted a considerable element in the item last enumerated in the schedule of property under the designation of ' all other property.'* " (Rec., p. 28).

" Q. What do you understand by the meaning of the word ' franchise,' as used by you in your direct examination? A. Well, the sense in which I use it might not be agreed to by lawyers or laymen, without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, *such as privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country*

and other countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each territory or country.

"Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained by way of franchise? A. Oh, no. As I understand it, the Western Union corporation acquires their right to exist as a corporation from an Act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word 'franchise,' although it might properly be considered, as the courts have held in a Massachusetts case, but I did not have that in mind when I used the word 'franchise.'" Rec. pp. 29–30).

THEODORE P. COOK, witness on behalf of the plaintiff in error, testified that he is the Superintendent of the defendant Company, having jurisdiction over six States, of which Missouri is one. That he has been continuously in the employment of defendant Company for twenty-eight years, holding different positions. (Rec. p. 34). Witness made up a list of the property owned by defendant in Missouri on June 1st, 1898, other than poles, wires, fastenings, batteries and instruments, and shows that it consisted of horses, wagons and certain furniture. That the greater portion of the property last mentioned was located in St. Louis, Kansas City and St. Joseph, and that it was taxed in those cities and the taxes thereon paid. (Rec. p. 36). That the property of the character last mentioned, owned by defendant in Missouri, outside of the three cities mentioned, on June 1st, 1898, would not exceed $1,000. That the whole of the Company's property in Missouri on June 1st, 1898, other than

poles, wires and instruments would not exceed $5,000 in value. *That the Company does not possess any franchises, ordinances or gifts from the State of Missouri or any of its subdivisions, counties or municipalities, and did not on June 1st, 1898, excepting an ordinance of the city of Columbia, granting the Company the right to put poles on certain streets in that city.* (Rec. p. 38). Witness was familiar with the condition of the Company's plant in Missouri on June 1st, 1898, and with cost of the material and labor necessary to construct that system. That in his judgment the system as it existed on June 1st, 1898, had depreciated to the extent of 65 per cent. That this figure is given as the result of observation and experience on the part of the witness extending through twenty-five years. Witness gives the pole and wire mileage on June 1st, 1898, of defendant in Missouri, and shows in detail the cost per mile of erecting poles and wires and cost at that time of the instruments used in Missouri; and makes the total cost on that date of an absolutely new system equivalent in extent to that actually existing, amount to $984,357.89. That $10,000 added to the sum last mentioned for property owned by the company other than its poles, wires, etc., would represent the actual cost of reproducing on the date mentioned *all the property* of the defendant in Missouri (Rec., pp. 39, 40).

The following certified copy from the RECORD OF THE STATE BOARD OF EQUALIZATION, containing the resolution and entry under which the assessment complained of in this case was made, was offered in evidence as follows :

STATE OF MISSOURI,

Office of State Auditor.

Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State Board of Equalization, viz.:

The State Board of Equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Compans, *and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company*, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State Board of Equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State Board of Equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles, at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property at	856,400.56
Total	$1,827,727.45

STATE OF MISSOURI,
Office of State Auditor.

I, JAMES M. SEIBERT, State Auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the order of the State Board of Equalization, respecting the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State Auditor. Done at office in the City of Jefferson, this 8th day of June, 1900.

J. M. SEIBERT,
State Auditor.

[SEAL.]

Rec., pp. 30-31.

VARIOUS EXHIBITS respecting matters referred to in testimony of witness THEODORE COOK were offered in evidence.

Rec., pp. 31–33; pp. 43–54.

The cause was heard before the Circuit Court of Jackson County, Missouri, which sustained the contention of defendant below, with respect to the item "all other property," and which Court found as a fact that such item embraced franchises derived from the Federal Government, and that the same were non-taxable by reason of such derivation, and found the further fact that the defendant is a Governmental agent and instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority.

The remainder of the assessment was sustained by the Court.

THE FINDINGS of the trial Court and declarations of law made are as follows:

"The Court declares the law to be that the assessment and valuation made by the State Board upon the poles, wires and instruments owned by defendant in this State *is final and conclusive and is not subject to review or attack in this suit.*

"From the evidence, the Court finds that the third item of the tax bill sued on designated as 'on all other property' *was intended to embrace the right of the defendant to operate a telegraph system along and over the post roads of the United States,* under a contract between the defendant and the United States, by which contract the United States was given the precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by it the United States is given the right to purchase said system, at any time, at a price to be fixed by a board of arbitrators. On this state of facts, the Court declares the law to be that as to said third item the plaintiff cannot recover.

"The Court declares the law to be that a franchise derived from the United States giving to the defendant the right to construct and operate its telegraph system along the post-roads of the United States is not subject to taxation by the State of Missouri.

"The court declares the law to be that when the defendant accepted the terms of the Act of Congress set out in defendant's answer, and undertook and agreed to place its poles and wires along and over the post roads of the United States, in consideration of which the defendant agreed to give the United States precedence in the transmission of its messages at such price as the United States might name and further agreed to sell its telegraph system at any time to the United States on such terms as a board of arbitrators might determine, the defendant then became an agency of the United States and such privilege or franchise cannot be assessed and taxed by the state of Missouri."

Rec., pp. 55, 56.

Judge HENRY, before whom the case was tried, who made the declarations of law and findings of fact referred to, accompanied them with an opinion (Record

pp. 60–63) in which, referring to the action of the State Board, he says:

"*The State Board of Equalization placed a value on the defendant's telegraph line, its poles, wires and all other property not included in that which the law requires the company to give in to the county assessor*, AND THEN FIXED THE VALUE OF ALL OTHER PROPERTY INCLUDING AND SPECIFYING THE FRANCHISE. In fact, as disclosed by the testimony in the case, there was no other property except the poles, wires and instruments and that which had already been listed with the county assessor. *It was in effect an attempt to tax the franchise as distinct from the visible property*, but whether this is so or not, the entire assessment as to the franchise and the other property, as classified by the State board of equalization, must fall to the ground. For if the franchise is not subject to taxation by the State, and there was other property than that specified in the first class of property valued by the board, the assessment of the franchise and such other property in gross, without a separate valuation of the franchise and the other property, violates the entire assessment as held by the Supreme Court of the United States. It follows that the judgment must be for defendant on that item of plaintiff's demand."

As to the method pursued by the State Board of Assessment in arriving at the valuation and assessment, the validity of which is in question in this case, the Supreme Court of Missouri, in its opinion (Record, p. 75), says:

"In the case at bar the board of equalization *first* ascertained the number of miles of poles and wires and the number of instruments owned by the defendant, and used in this State, *and placed a valuation upon them.* The board *then* considered 'all other property' owned by the defendant located in this State *and put a valuation upon that.* The defendant's evidence shows that it did own other property in this State besides the poles, wire and instruments specially enumerated and valued. But it contends that such other property was worth only one thousand dollars and not $856,400.56, as the board found it to be worth. The utmost that

could therefore be said of this item is that the defendant and the board differed in opinion as to the value of *such* other property, and this being an action at law wherein the defendant attempts to defeat the whole levy, as long as it appears that the defendant owned some property and the only question is whether it was of the one value or the other, the defense must fail, for a court of law has no machinery for determining how much such property was really worth, and in addition if all defendant claims be true it is merely a case of overvaluation and not an erroneous assessment, and under the law of this State mere overvaluation is no defense to a suit upon a tax bill, for section 7579 R. S. 1889 (sec. 9197 R. S. 1899) expressly provides that: 'Valuations placed on property by the assessor or board of equalization shall not be deemed to be erroneous assessments under this section'" (See Appendix).

JUDGMENT was entered by the trial Court in favor of the plaintiff below and against defendant for the sum of $605.82, together with interest, and an allowance of commissions thereon in favor of the collector, and also an attorney's fee to be taxed under the laws of the State of Missouri.

Rec., p. 57.

MOTIONS FOR NEW TRIAL were filed by plaintiff and defendant below.

The only ground of motion for new trial of defendant below to which special attention need be called is the first:

"The uncontradicted evidence shows that the rule for assessing property generally in this state is on a basis not to exceed forty per cent. of its value, while the property of the defendant was assessed by the State Board of Equalization on a basis of full actual value, by which the defendant was denied the equal

protection of the law and was in violation of the Constitution of the United States, as provided by the 14th Amendment thereto."

Rec., p. 58.

Both motions for new trial were overruled by the trial Court.

Rec., pp. 58, 59.

Thereupon both plaintiff and defendant below filed affidavits for appeal to the Supreme Court of the State of Missouri.

Rec., p. 59.

A BILL OF EXCEPTIONS, approved by both parties to the cause, was duly presented, signed and allowed.

Rec., p. 60.

The cause was advanced for hearing in the Supreme Court of the State of Missouri, and afterwards heard.

THE SUPREME COURT reversed and annulled the judgment of the Circuit Court of Jackson County in so far as the latter Court held the item "all other property," $856,400.56, to be unlawful, and affirmed the findings of the Court in so far as the judgment rendered by the Circuit Court of Jackson County was concerned, and thereupon ordered judgment to be entered in favor of the plaintiff below for the sum of $1,027.22, together with the interest thereon, and the costs and charges.

Rec., pp. 66, 67.

A PETITION FOR A WRIT OF ERROR was duly filed in the Supreme Court of the State of Missouri.

Rec., pp. 78, 79.

Thereupon a WRIT OF ERROR was awarded by this Court to the Supreme Court of the State of Missouri, and the cause thus brought to this Court.

Rec., pp. 1, 2.

The usual citation in pursuance of the writ was issued.

Rec., pp. 1, 2.

A bond was given in the sum of $3,000 and approved by the Chief-Justice of the Supreme Court of Missouri.

Rec., pp. 81, 82.

Assignment of Errors.

1. The Supreme Court of Missouri erred in deciding that plaintiff in error was not discriminated against by the State Board of Equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and actual value, whereas, said Board intentionally and systematically equalized and adjusted the values of real and personal property generally for purposes of taxation at forty per cent. of the actual value of such property, all of which plaintiff in error set up and claimed was in violation of the 14th Amendment to the Constitution of the United States.

2. The Supreme Court of Missouri erred in refusing to hold that the franchises exercised by plaintiff in error in the State of Missouri were derived wholly from the Constitution of the United States and the Act of Congress approved July 24th, 1866, entitled: "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and that said State Board of Equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The Supreme Court of Missouri erred in refusing to hold that the item involved in the assessment complained of in said cause under the head of "all other

property," and amounting to the sum of $856,400.56, was in fact an assessment of the franchises of plaintiff in error derived from the Federal Government in pursuance of the Constitution of the United States and the Act of Congress mentioned in the error last assigned, and, therefore, violative of the laws of the United States, and of the provisions of the Constitution of the United States.

4. The Supreme Court of Missouri erred in failing to find that the only franchises exercised by plaintiff in error in the State of Missouri were those derived from the Constitution of the United States and the Act of Congress mentioned, and that the same were not subject to taxation by the State of Missouri through said Board of Equalization, or otherwise.

5. The Supreme Court of Missouri, having found and held that plaintiff in error was a Governmental agent and an instrument of inter-state commerce erred in holding that the item " all other property " hereinbefore mentioned did not embrace franchises of plaintiff in error derived from the government of the United States, and that the same had been taxed in said item in violation of the laws of the United States, and of Section 8, Article I., and other provisions of the Constitution of the United States.

6. The Supreme Court of Missouri erred in rendering judment in favor of defendant in error for the amount sued for.

7. The Supreme Court of Missouri erred in refusing to entertain the defense made by plaintiff in error for the assigned reason that no tender of any part of the taxes involved had been made by plaintiff in error to defendant in error.

8. The Supreme Court of Missouri erred in reversing the finding and judgment of the Circuit Court of Jackson County, Missouri.

POINTS AND AUTHORITIES.

I.

The Western Union Telegraph Company is an agent of the Government and an instrument of interstate commerce; and its franchises exercised in Missouri having been derived solely from the Federal Government are exempt from taxation by the taxing authorities of the State.

Pensacola Tel. Co. vs. West. U. Tel. Co., 96 U. S., 1.
Telegraph Co. vs. Texas, 105 U. S., 460.
California vs. Pacific R. R., 127 U. S., 1.
San Francisco vs. West. U. Tel. Co., 96 Cal., 140.
C. P. R. R. vs. California, 162 U. S., 91.
Wabash Ry. Co. vs. Illinois, 118 U. S., 557.
R. R. Co. vs. Peniston, 18 Wall., 5.
Leloup vs. Port of Mobile, 127 U. S., 640.
Robbins vs. Taxing Dist., 120 U. S., 493.
Phil. S. S. Co. vs. Pa., 122 U. S., 344.
West. U. Tel. Co. vs. Pendleton, 122 U. S., 358.

II.

The State Board of Equalization has discriminated against plaintiff in error and in favor of other persons generally. The Board, in order to discriminate as aforesaid, fixed the value of the property of the Western Union Telegraph Company for taxation at far more than its full actual

cash value and intentionally so equalized and adjusted the values of other property throughout the State at 40 per cent. of the actual cash value thereof. The necessary effect of all of which has been that the said company has been discriminated against in violation of the Fourteenth Amendment to the Constitution of the United States.

Pelton vs. National Bank, 101 U. S., 143.
Cummings vs. National Bank, 101 U. S., 153.
National Bank vs. Kimball, 103 U. S., 732.
State ex rel. vs. Cunningham, 153 Mo., 642.
State ex rel. Wright vs. St. L. I. M. & S. Ry. Co., 82 Mo., 683.
State ex rel. vs. Davis, 131 Mo., 457.
Railroad Co. vs. State, 64 Mo., 294.
State vs. Hannibal & St. Joseph R. R. Co., 75 Mo., 208.
Ward vs. Board of Equalization, 135 Mo., 309.
House vs. Clinton Co. Court, 67 Mo., 522.
State ex rel. vs. Board of Equalization, 108 Mo., 235.
State ex rel. vs. Vaile, 122 Mo., 33.
People vs. State Board of Equalization, 191 Ill., 528, 61 N. E., 339.
Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark., 461; 36 S. W., 1060.
Los Angeles Co. vs. Ballerino, 99 Cal., 597; 32 Pac., 583; 34 Pac., 329.
Pacific Postal Co. vs. Dalton, 109 Cal., 604; 51 Pac., 1072.
Randall vs. City of Bridgeport, 63 Com., 321; 28 Atl., 523.
Board of Supervisors vs. Railroad Co., 44 Ill., 229.

Iowa vs. Dakota Tel. Co. vs. Schauber (Ia.), 91 N. W., 78.
C. B. & Q. R. Co. vs. Board of Comrs., 54 Kans., 786; 39 Pac., 1039.
Merrill vs. Humphrey, 24 Mich., 170.
Walsh vs. King, 74 Mich., 350; 41 N. W., 1080.
State ex rel. vs. Savage (Neb.), 91 N. W., 557.
Manufacturing Co. vs. Strafford, 51 N. H., 455.
Manchester Mills vs. Manchester, 58 N. H., 38.
Mercantile Natl. Bank vs. Mayor, etc., of New York (N. Y.), 64 N. E., 756.
City of Chattanooga vs. Railroad Co., 7 La., 563.
Weeks vs. City of Milwaukee, 10 Wis., 242.
Hersey vs. Supervisors, 16 Wis., 185.
Lefferts vs. Supervisors, 21 Wis., 688.
Iron Co. vs. Hubbard, 29 Wis., 52.
Hersey vs. Board of Supervisors, 37 Wis., 75.
Railroad Tax Cases, 13 Fed., 722.
Second National Bank vs. Caldwell, 13 Fed., 429.
In re Watson, 15 Fed., 511.
California Tax Cases, 18 Fed., 385.
State of Indiana vs. Putnam Palace Car Co., 16 Fed., 193.
Dundee Mortgage Co. vs. School Dist. No. 1, 21 Fed., 151; 24 Fed., 197.
Taylor vs. Louisville & Nashville R. Co., 85 Fed., 302; 88 Fed., 350.
Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557.
Cooley on Taxation, 2 Ed., pp. 748–785.
Judson on Taxation, Sec. 478.
Welty on Assessments, Sec. 186.

III.

Where discrimination of the character mentioned under Point II. exists, it amounts to fraud in law and a denial of equal protection of the law and the Courts will grant relief. Likewise where lack of jurisdiction to make the assessment is shown.

Authorities under Point II. and:

State ex rel. vs. Vaile, 122 Mo., 33.
State ex rel. Love vs. Railroad, 121 Mo., 12.
Black vs. McGonigle, 103 Mo., 192.
State ex rel. Morris vs. Cunningham, 153 Mo., 642.

IV.

In all cases where franchises such as those possessed by the Western Union Telegraph Company have been considered in estimating the value of property assessed and such assessments have been sustained statutes providing for the assessment of corporations under a "unit" system have contained express and detailed provisions for correctly ascertaining the valuation of the property to be assessed. No such provisions are found in the laws of Missouri. The "ways and means" for any such assessment have not been prescribed. Fur-

thermore, the statutes of Missouri exclude any such mode of assessment of telegraph companies.

West. U. Tel. Co. vs. Mass., 125 U. S., 530.
Mass. vs. West. U. Tel. Co., 141 U. S., 40.
W. U. Tel. Co. vs. Taggart, 163 U. S., 1.
State Railroad Tax Cases, 92 U. S., 575.
Pullman Co. vs. Penn., 141 U. S., 18.
Adams Ex. Co. vs. Ohio, 165 U. S., 194, and on rehearing, 166 U. S., 185.
Bridge Co. vs. Kentucky, 166 U. S., 150.
St. Louis vs. Wennecker, 145 Mo., 238.

V.

The franchise of a corporation "to be" a corporation is not taxable in a foreign State in which it is licensed to do business.

London & S. F. Bank vs. Block, Collr., 117 Fed. Rep., 900.

ARGUMENT.

The first contention of the plaintiff in error is that the item in the assessment made by the State Board of Equalization for the taxes of 1899, reading "all other property" at $856,400.56, means franchises, and franchises alone.

Counsel for defendant in error will doubtless admit that the franchises, *eo nomine*, of the telegraph company, were valued and assessed, and that they constituted by far the greatest item, and, perhaps, the only item, covered by the phrase "all other property." But they will, doubtless, likewise insist that the word "franchises" was not regarded by the assessing board in its technical signification, and that it was used simply as a synonym for that vague, shadowy, incorporeal *something* which, like the "unearned increment," is impossible to define, but which, nevertheless, gives actual value to the use of corporeal property, finding its expression in *earning capacity*. This they call the intangible property of the telegraph company, and insist that it is the province of the assessing board to ascertain as best they can, and by whatever groping process they may choose to employ, the value of this intangible property, and that such property, being neither real nor personal, should be taxed at its full value.

Later in this argument we shall endeavor to show that to make available the "unit" rule sanctioned by this Court in such cases as *The Adams Express Company vs. Ohio* (165 U. S., 194) and *Bridge vs. Kentucky* (166 U. S., 150), the *Legislature* of the State should

point out the precise mode of arriving at the values to be placed upon the intangible property of a corporation within the State. In other words, that it is for the *Legislature* to prescribe the *principle* of taxation under the unit rule, in order that the Courts may have some basis for determining whether the mode prescribed is just or unjust. It would make confusion worse confounded if different taxing boards, in secret sessions, could adopt methods peculiar to themselves and unknown to the Courts, differing from time to time as the boards were differently constituted.

When by a divided Court it was decided in *Railroad Company vs. Peniston* (18 Wall., 5) that the property of a corporation created by the Federal Government, such as the Union Pacific Railroad Company, could be taxed, the opinion of the Court was careful to specify that *only the real and personal property of the corporation, as distinguished from its franchises, could be taxed by a State, and that there could be no tax upon the operations of the company.* If the officers of Lincoln County, Nebraska, in addition to rating the tangible property of the railroad company, had undertaken to place a value upon its intangible property, including the *rights* created by Congress, we venture to assert that the opinion in the case of *Railroad Company vs. Peniston* would have been very different, and with no dissentients.

The trial Court, sitting as a trier of the facts (a jury having been waived) *made a specific finding from the evidence* that the item mentioned was intended to, and did, embrace the right of the defendant to operate its system over and along the post-roads of the United States under its grant from and contract with the Government, and, therefore, that the item embraced the

"franchises" granted by the Government to plaintiff in error; and we submit from the evidence that such is the only finding that could have been made (Rec., pp. 56, 63). The uncontradicted testimony of Mr. Cook, for many years an officer of plaintiff in error, shows that it possessed no real estate in Missouri, and that on June 1st, 1898, its entire property in that State consisted of certain poles, wires and instruments, constituting what may be termed its plant, and in addition thereto certain personal property, all of which was specifically enumerated, of the character of horses, wagons, furniture, etc. (Rec., pp. 35–42).

We print in an appendix hereto the statutes of the State of Missouri relating to the powers and duties of the board of equalization, and the mode of taxation of property generally, and railroads and telegraphs (Sec. 9387 R. S. of Missouri, 1889, 2 vol., p. 2181; R. S., Sec. 9360, p. 2174).

Section 9387, R. S. Mo., 1899, provides that all property real and personal, including franchises owned by telegraph and express companies, shall be subject to assessment by the State Board of Equalization *in the same manner as railroad property, and to the same extent as the property of private persons.* Section 9360, R. S. Mo., covering railroads, and by adoption telegraph companies, provides that all property, which we may designate as locally situated, such as horses, wagons, furniture, money, etc., of companies such as the Western Union Telegraph Company, *shall be assessed by local taxing boards.* The testimony in the case showed that all *such* property, barring, perhaps, $1,000 worth, distributed throughout the State, *was assessed and taxes paid thereon for 1899* (Rec., pp. 35, 36, 37). So far, therefore, as corporeal property is con-

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cerned, we have only to deal with the company's general plant, consisting of its poles, wires and instruments. As shown by the official record of the Board, this plant of the company, consisting, as mentioned, solely of poles, wires and instruments, was assessed by the Board, which divided the same into three classes, imposing separate and distinct values upon the poles, wires and instruments respectively (Rec., p. 30). The same record shows the fourth item of "all other property" mentioned. It also shows and the testimony of Secretary of State LESUEUR, and Attorney General CROW, two of the five members of the Missouri State Board of Equalization, sustained its recital, that franchises were considered in the assessment that was made. This testimony on the part of the Secretary of State and Attorney-General is set forth in the abstract of the testimony which precedes this argument. The Attorney-General admitted that the assessment for 1899 was largely in excess of other years, and that franchises constituted a "considerable element of the item all other property" (Rec., p. 28).

We think it has been absolutely demonstrated that not only did franchises constitute a considerable portion of the item mentioned, but that the item consists *of franchises, and franchises alone.* The question then arises as to what franchises the Western Union Telegraph Company possesses, and what, if any, portion of such franchises may be taxed under the Missouri statute, which, as shown, specifically includes "franchises" in the classes of property of Telegraph Companies to be taxed. No argument is necessary to sustain the rule, so often laid down by this Court, that the State has the power to tax such franchises only as it controls; nor the converse, that States have no right

to tax, or in any way burden franchises which emanate alone from Federal grant.

It was admitted that the Western Union Telegraph Company is a corporation of the State of New York, and that it is not organized under the Laws of Missouri, and has not secured a license to do business within the State under the statute permitting foreign corporations to secure such license and enjoy the privileges and incur the obligations of Missouri corporations (Rec., p. 16). It was further admitted that the Telegraph Company accepted the provisions of the Act of Congress approved July 24th, 1866 (U. S. Statutes at large, 1865–1867, pp. 221 and 222), and that such acceptance has never been withdrawn. (Said Act reprinted in APPENDIX hereto.) Briefly, that Act of Congress gives the company the *right* to maintain its system of telegraph along the post-roads of the United States, embracing all public roads and highways, and over, under and across the navigable streams of the United States, and, under severe penalties, requires the company to transmit and give priority to messages of the Government between its various departments, officers and agents, at rates annually fixed by the Postmaster-General. The company, by acceptance of this act, also agrees that the Government may at any time purchase the entire system of the company upon a valuation to be fixed by appraisers. Plaintiff in error showed affirmatively that *it did not possess a single franchise granted by the State of Missouri*, or any of its territorial subdivisions other than perhaps in one small instance where one of the towns of the State, by ordinance, gave the company the right to set its poles along certain streets (Rec., p. 38). This right, as has been repeatedly held, the company possessed under its Fed-

eral grant, giving it the right to place its poles along the streets, highways, etc., for, by an Act of Congress, all streets, highways, etc., are declared post-roads.

It is unnecessary to refer to any other case than that of City of St. Louis vs. Western Union Telegraph Company (148 U. S., 92), in which, among other things, Mr. Justice BREWER said (pp. 104, 105):

"Indeed, it may be observed in the line of the thoughts heretofore expressed that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets *cannot be denied by the city;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things, that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

The Statutes of Missouri with respect to telegraph companies limit the franchises given by those acts to telegraph companies organized under the Laws of Missouri, and this has been the law ever since the revision of the statutes in 1865, Chapter 65, page 349, Section 5 (See Appendix for Sec. 5, Act of 1865). It is true, therefore, that every franchise of the company, by virtue of which it carries on its business in the State of Missouri, is in pursuance of the Constitution of the United States and of the Act of Congress mentioned, under which it becomes an instrument of interstate commerce and a Government agent.

This has been decided many times, but it will suffice to call attention to some of the cases decided by this Court, whose decisions with respect to this company as an instrument of interstate commerce and govern-

mental agent is, of course, the law for all the Courts of the Union, State and Federal.

In *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1, this Court held that the Act of Congress of July 24th, 1866, is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service, and the opinion holds that such power is not limited to such military or post-roads as are on the Public Domain.

The case of *The Telegraph Company vs. Texas*, 105 U. S., page 464, where the Court say :

" A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. * * * Congress, to facilitate the erection of telegraph lines, has authorized the use of the public domain and the military and post-roads for that purpose. As a return for that privilege, those who avail themselves of it are bound to give the United States precedence in the use of their line for public business at rates to be fixed by the Postmaster General. *Thus, as to government business, companies of this class become government agencies.* The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, *and of a government agent for the transmission of messages on public business.*"

The trial Court, *with which, of course, rested the determination of the facts,* expressly found, under the stipulation contained in the record, that plaintiff in error was an agent of the Government (Rec. p. 56). The Supreme Court of Missouri, in its opinion, expressly finds that plaintiff in error never received any authority or right

from the State of Missouri to do business in that State, or to erect its poles or wires upon or over the public highways and places in the State; that it does not fall within the statute of the State granting such franchises, for the reason that such grant is expressly limited to *telegraph companies organized under the laws of the State*, and further finds "*the defendant's sole right* to do business in Missouri arises out of the Act of Congress approved July 24th, 1866" (Rec., p. 72). That Court further declares that, as the plaintiff in error has accepted the provisions of the Act of Congress mentioned, and agreed to transmit messages for the Government at rates fixed by its officers, it is, "as to Government business, a Government agency" (Rec., p. 72). While the language of the Supreme Court of Missouri, declaring that plaintiff in error is a Government agency as to Government business, is emphasized in its opinion, we do not see how plaintiff in error could be a governmental agency as to any other business.

The only significance of the claim which plaintiff in error has repeatedly made, and which has been established by this Court, that it is a governmental agency possessing franchises entitling it to carry on its business along military and post roads and across navigable streams, etc., all within the jurisdiction and control of the Federal Government, is that these rights which it possesses from the Government, and for which it renders the highly valuable service and incurs the obligations mentioned, cannot be taxed or in any manner impaired or interfered with by State authority. And no contention is now made that, even though it be a governmental agency and possessed of these franchises, its ordinary, tangible *property* within

or under the control of the State of Missouri is not subject to taxation (quoting the language of the Missouri statute on the subject) "the same as the property of private persons."

That the Western Union Telegraph Company is an instrument of interstate commerce the authorities expressly declare. Under the Constitution of the United States, Congress alone has power to impose burdens upon interstate commerce; otherwise it would be within the power of a State to exclude such instruments from its domain. It will suffice to mention some of the cases decided by this Court sustaining this rule, which is elemental as a matter of construction of the Federal Constitution:

Wabash Ry. Co. vs. State of Illinois, 118 U. S., 557.
R. R. Co. vs. Peniston, 18 Wall., 5.
Leloup vs. Port of Mobile, 127 U. S., 640.
Robbins vs. Taxing Dist., 120 U. S., 493.
Philadelphia S. S. Co. vs. Pa., 122 U. S., 344.

In the *Western Union Telegraph Company vs. Pendleton*, 122 U. S., at page 358, the Supreme Court, referring to many cases on the subject of the power of States with respect to instruments of interstate commerce, declares telegraphic communication between the States to be interstate commerce, within the meaning of the Federal Constitution, and that it can be in no wise burdened by State authority. The Court say:

"In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed whenever that body chooses to exert its power, and it is

also held that the States can impose no impediment to the freedom of that commerce."

It is the result of the authorities that no burden can be placed upon an agent of the Government, or of interstate commerce, and hence not upon its franchises. For, as was said by Chief Justice MARSHALL, in *McCulloch vs. Maryland:*

"The power to tax involves the power to destroy, and if such power was possessed by the States it would rest with them whether any instrument of interstate commerce should be allowed within their borders."

The proceedings of the State Board of Equalization show that the board divided the property which they assessed, at an aggregate of more than $1,800,000, into four classes, but specifically assessed under a separate and distinct class "all other property" which, *as has been proved and found, means franchises.*

Counsel in the courts below referred, and doubtless here will refer, to the well-known cases in this Court of *Massachusetts vs. Western Union Telegraph Company*, 125 U. S., 530 and the second *Massachusetts Case*, 141 U. S., 40; *Western Union vs. Taggart*, 163 U. S., 1; *Henderson Bridge Company vs. Kentucky*, 166 U. S., and the *Adams Express cases*, in the same volume and volume 165, to sustain the right of the State to take into consideration franchises in fixing the value of the property of companies, such as the Western Union, for the purposes of taxation. Those cases arose under State statutes prescribing with the utmost detail the manner in which the taxing board should reach the *value of the company's property*, and taxation thereunder has been sustained for the reason, *expressed in*

every case, that such taxation was *not* upon franchises granted by *Federal* authority, but was, *in fact*, upon the *real and personal property* of the companies. No such scheme of taxation of the property of telegraph companies is provided for by the statutes of Missouri. On the contrary, those statutes expressly provide for the separate and distinct assessment and valuation of the *tangible* property and *State* franchises. It will be seen, by reference, that this is the scheme of taxation of the Missouri statutes printed in the appendix. The point to notice here is that these statutes do not provide for assessing railway property, including its franchises, on the unit principle, and failing so to provide, that principle of taxation is excluded and inconsistent with the provisions of the statutes themselves.

Statutes which enact the unit principle of valuation of the entire property of a corporation must make provision for excluding from the valuation to be fixed all extra-territorial property and all property which is locally assessed at its full value (and which, if included, would mean double taxation), as well as property which is exempt from taxation. And the importance of having such provision clearly made *by law* is forcibly shown by the Missouri taxing laws, which have been referred to. *We have shown that the ordinary property of the company which is locally situated can only be assessed and taxed by local boards*, and that, therefore, the State Board can only tax the general plant of the company. Therefore, any law which would subject the company to taxation on what has been styled the unit or mileage basis *must provide* not only for the exclusion of the company's property locally taxed in Missouri, but such property in other States, as well as any exempt property that it may have. Mr. Justice BREWER, in the

opinion on the rehearing of the *Adams Express case*, 166 U. S., 185, says :

" If half of the property of the Adams Express Company, which by its own showing is worth '16 millions of dollars and over, is invested in United States bonds, and, therefore, exempt from taxation, or invested in any way outside the business of the company so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That, *if such facts exist, they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court.*"

And a number of cases decided by the Supreme Court of the United States is cited in support of the language used.

In reaching a valuation to be placed on the property of a company whose business and property extend through every State and Territory of the Union, many matters of detail must be considered, and it is necessary not only as a matter of fairness, but as a matter of law, that the *method* of reaching such a conclusion *shall be prescribed by law*, and not left to the arbitrary judgment or guess of an assessing board. The necessity for this must be apparent to any one familiar with the subject. While it is true that in valuing property, for illustration, of a telegraph company, the value of its poles, wires and instruments may not alone constitute the full value of the company's property in a State, and the full value may be fixed and taxes assessed thereon, such valuation cannot be *arbitrarily* made but must be reached through prescribed and certain methods, as an examination of the statutes of Massachusetts, Ohio, Illinois, Indiana and Kentucky, to be found in the

reports of this Court, in cases mentioned, will show. The statutes of Missousi, under which telegraph companies are taxed, make no provision whatever for the manner in which franchises shall be ascertained or taxed, and even though such franchises were taxable, the Legislature not having prescribed the manner in which their value shall be ascertained, no assessment on the unit plan can be made.

In *St. Louis vs. Wennecker*, 145 Mo., 235, the Supreme Court of Missouri say :

> " The legislature must provide for the taxation of property ; the ' ways and means ' for the assessment thereof must be prescribed by law. Omissions in that behalf cannot be supplied by the courts."

And we may add that it is equally true that omissions in that behalf cannot be supplied by any rules adopted by the assessing authorities, and this limitation likewise applies to assessing boards ; otherwise a special tribunal of very limited jurisdiction would have powers to adopt or invent machinery not possessed by a court of general jurisdiction.

It is perfectly established by the testimony that the item " all other property " must have referred, and did refer solely to franchises. The use of the phrase " all other property " was evidently made by the State Board to conceal the fact that it alone covered franchises, as it doubtless knew that the company exercised no franchises in Missouri emanating from the State, or that could be the subject of taxation as such. Our inference in this respect is not mere guesswork, but is known to all who have had occasion to consider the actions of boards of equalization or taxation in these matters. Judson, in his work on Taxation in Missouri, at page 295, speaking on this subject, says :

"While these boards decline to tax franchises specifically as such, it is clear from the valuations made by the State Board that the earning power of the properties, that is the value in use of the tangible and intangible property of both railroads and street railroads must have been considered. *This is only another name for the taxation of franchises.*"

We again remark that the absolute proof in this case coming mainly from the officers of the State Board does not leave the item in controversy open to question, but shows that it consists of franchises alone.

Did the State Board of Equalization have power to tax the franchises of the Western Union Telegraph Company?

On this subject we have the decision of this Court, which is the law, as we understand it, to-day.

This Court in *California vs. Pacific Railroad Company*, 127 U. S., 1, has laid down the law with respect to taxation by a State of franchises granted by the Federal Government, and which, we submit, is decisive of the question now under consideration.

Incidentally, we may remark in advance that the case last cited also meets a suggestion made in the lower courts, that the telegraph company was a mere contractor inasmuch as the Government had no interest in its earnings, and shows that such is not the fact.

The California case involved the taxation of Governmental franchises granted to a railroad whose main business, like that of the telegraph company, was serving the general public, and it was expressly held that the assessment was void because in the taxation of the company's franchises, *some of which were derived from the State*, the Governmental franchises were included. The present case is much stronger for the reason that all of the franchises sought to be taxed are derived ex-

clusively from the General Government. We quote from the case mentioned as follows :

"Assuming then that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. *They were granted to the company for national purposes and to subserve national ends.* It seems very clear that the state of California can neither take them away, nor destroy, nor abridge then, nor cripple them by onerous burdens. Can it tax them? *It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing. But, may it tax franchises which are the grant of the United States? In our judgment it cannot.*"

And, after defining the meaning of a franchise, the Court proceed :

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state, without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless. As said by Chief-Justice MARSHALL in McCulloch vs. Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, *it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state.* The power conferred emanates from and is a portion of the power of the government that confers it. *To tax is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty.* It is unnecessary to cite cases on, this subject."

In *Central Pacific Railraod Company vs. California* 162 U. S. 91, this Court was called upon to consider the question as to whether an assessment imposed by the State of California upon the franchises of the Railroad Company could be sustained. The company was

required under the laws of California to make return of its property and franchises for taxation. It was organized under the laws of California and derived its ordinary franchises from that State. It also had franchises which were granted it by the Federal Government. Inasmuch as in its return it simply fixed a gross sum for the valuation of its franchises *and did not distinguish or attempt to distinguish between State and Federal franchises, and inasmuch as the lower Court found as a matter of fact that the franchises returned were those granted by the State,* the Supreme Court of the United States sustained the taxes, holding that the company was estopped from denying that the return made by it was of property properly subject to taxation, and that the presumption existed that the franchises which it returned for taxation were not those exempt under the laws of the United States. This case, however, expressly reaffirms that in the 127 U. S., from which we have quoted, and is renewed authority for our position that Federal franchises as such cannot be taxed.

This question involving franchises of the Western Union Telegraph Company has also been determined in the Supreme Court of California in the case of *San Francisco vs. Western Union Telegraph Company,* 96 Cal. 140, and the opinion contains an analysis of the then existing Federal cases upon the question. That Court held that, as the Western Union was an instrument employed by the Government for carrying into effect its sovereign power, it was beyond the power of the State to levy a tax upon its franchises *in addition to the taxes which, in common with others,* it paid upon its property.

Analysis of and Comments on the Opinion of the Supreme Court of Missouri in This Case.

Let us now analyze the opinion in this case of the Supreme Court of Missouri, and see how the branch of the case now under discussion has been met. That Court expressly finds that the Western Union Company is not organized under the laws of Missouri, and that it has never received any authority or right from the State to do business in the State, or erect its plant therein; that the franchises given by the laws of Missouri to Telegraph Companies are expressly limited to such companies as are organized under the laws of the State; that "the defendant's sole right to do business in Missouri arises out of the Act of Congress, approved July 14th, 1866;" that, as stipulated in the case, the company accepted the provisions of the act, and has ever since been operating under it; that the act is a legitimate regulation of commerce and constitutes the company as to government business a government agency, and an instrument of interstate commerce (Rec., p. 72). Recital is also made as to the express finding of the lower Court, as trier of the facts, that the item in controversy "all other property" included franchises derived from the Federal Government, and, therefore, non-taxable, and that the company is a governmental agent and instrument of interstate commerce. But the Supreme Court held that the trial Court was in error in holding that the defendant derived its franchise, that is, its right to exist and be a corporation and do a telegraph business, from the Government. That such franchise was derived from the State of New York and not from the Government;

that "neither the act of Congress of 1864 (1866) nor its acceptance by the defendant created the defendant or gave it the right to do business" (Rec., p. 76). And the conclusion is, *therefore*, reached that, in determining the value of the property of the company in Missouri, the Board of Equalization took into consideration the various matters recited in their record, but "it did not and could not have included therein any franchises derived by the defendant from the Government of the United States *because that Government had conferred no such franchises, nor was such a valuation placed upon 'all other property' a tax upon the franchises of the defendant company*" (Rec., pp. 76, 77).

Upon what evidence in the case can such a finding rest? The record shows conclusively that no franchises from the State of Missouri are exercised in that State by plaintiff in error by virtue of any grant of the State of Missouri, and the laws of Missouri expressly forbid an ordinary foreign corporation to do business within the State excepting upon terms and conditions which are common to corporations created by the State of Missouri, and for which right express license must be secured. The testimony of Attorney-General CROW shows that the franchise of the Western Union under the laws of New York to be a corporation was *not* considered (Rec., p. 29), and his testimony and the testimony of the Secretary of State show *that franchises were considered and valued*, and we submit there could have been no other franchises than those granted by the Federal Government. Under the law as laid down in *London Bank vs. Black*, 117 Fed. Rep., 900, the New York franchise was not subject to taxation. "But," say the Supreme Court of Missouri, "in the item 'all other prop-

erty complained of the telegraph company admits that it did have in Missouri some other property which did not constitute a part of its general plant of poles, wires and instruments, and which had not been locally assessed, which was of the value of perhaps $500 to $1,000" (Rec., p. 75). All of this property is shown, by the testimony of Mr. Cook and the schedules furnished by him, to have consisted of property which is subject, under the laws of Missouri, *to local assessment and local assessment only, and to be in nowise property which could, under the laws of Missouri, have been considered by the State Board of Equalization in making its assessment.* We recall to the Court the section of the Revised Statutes of Missouri, to which we have heretofore referred providing for the assessment of the property of telegraph companies in the same manner as that of railroads, and which expressly requires that property of the character mentioned, being such as furniture, horses, wagons, tools, etc., shall be subject to local assessment by the local assessing authorities. There is no force in the position taken by the Supreme Court of Missouri that this property (too small, perhaps, to have been considered by the local authorities, such as an old desk in some country office, and an old stove in another country office and matters of that nature), *could* have been a portion of the $856,000 item complained of. Such being the *fact*, there was no "error of judgment" on the part of the State Board with respect thereto, and it follows, of course, that it was not necessary that the telegraph company should have tendered any tax, or have made any tender with respect to taxes upon such items. For the Supreme Court of Missouri to declare that the

discrepancy between a sworn value of $1,000 and an estimated value of $856,400, representing such miscellaneous items as desks, chairs, mules, wagons, &c., *was an error of judgment simply*, and uphold the action of the board on this ground, is, to say the least, a strain on judicial dignity.

Again, the suggestion is made in the opinion of the Supreme Court of Missouri that this defense is of an *equitable* nature, and could not be made excepting upon the condition that the conceded amount justly due be first tendered. The present case is purely one of law, the suit being an ordinary action at law upon a tax bill. *Under the Missouri practice defenses may be made of of both a legal and equitable nature.* The defense made with respect to the $856,000 item "all other property" is purely a defense in law, as it squarely attacks the validity in law of the item complained of, specifically made a part of the finding of the board, and the basis for an assessment thereon.

IN CONCLUSION upon this point, we therefore submit:

FIRST. That the proof and findings and opinion of the trial Court show the item of "all other property" to mean franchises alone.

SECOND. That franchises have been separately and specifically assessed by the State Board.

THIRD. That in all the Federal cases referred to where taxation has been sustained, although the value of the property has involved increasing value through franchises, the taxation has been sustained because upon actual *property alone.*

FOURTH. That in every one of the cases last referred to statutes have existed providing specific rules, modes and principles for ascertaining the valuation of the property.

FIFTH. That under the ruling of this Court in the *Adams Express case*, 166 U. S., 227, and of the Supreme Court of Missouri in the *Wennecker case (supra)*, it is *necessary* that the Legislature *prescribe the method* for ascertaining such valuation.

SIXTH. That no such method as was pursued in this case has been prescribed or is authorized by the laws of Missouri.

SEVENTH. That under the Federal and State decisions the franchises of the Western Union Telegraph Company derived from the Government cannot be taxed by a State.

EIGHTH. That its right *to be*, a franchise derived from the State of New York, cannot be taxed as property by the State of Missouri.

Unjust and Illegal Discrimination against the Defendant.

The defendant below in its answer set up the defense that the officers who are appointed to make assessments combined together and established a rule or principle of valuation which imposed a tax upon the defendant's personal property much higher than upon other personal property, and a rate grossly in excess of the average rate.

This defense, as stated in the answer, is as follows:

"Defendant avers that said State Board of Equalization, with a full knowledge of the values of said poles, wires and instruments, and with intent to injure this defendant by compelling it to pay an excessive and disproportionate share of state and local taxes, discriminated against this defendant, well knowing at the time that they were so doing, and so as aforesaid assessed the poles, wires and instruments of this defendant at far more than their true and actual value.

"Defendant avers that under the law it was the duty of said Board of Equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the state of Missouri among the several counties in the state, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said State Board of Equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the constitution and laws of said state of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in said state of Missouri, assess all property, to wit, other than the property of Telegraph Companies, at, to wit, from thirty-five to forty per cent. of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the state of Missouri this defendant was unlawfully and wrongfully discriminated against to the extent of sixty per cent. of the amount of taxes assessed by said State Board of Equalization and levied by the taxing officers of the state upon defendant in pursuance of such assessment" (Rec., p. 9).

This defense was established *in point of fact.* Its effect *in point of law* was, however, denied by the Supreme Court of the State.

The matters which have been set forth and proved in this cause as a defense to the action at law to recover the taxes assessed, have been repeatedly held sufficient to entitle one, against whom there has been an unlawful discrimination, to defend against the tax.

The Supreme Court of Missouri recognized the

authority of the long line of cases which hold that discrimination by officers imposing the tax, or making the assessment, is as pernicious as discrimination by statutory enactment, and in the opinion of MARSHALL, J., an extract from the opinion of Mr. Justice MILLER, in National Bank vs. Kimball (103 U. S., 732), is quoted with approval (165 Mo., 509). (Reprinted, Rec., pp. 67–78.)

The Missouri Supreme Court, in the case at bar, hold, however, that the defendant could not avail himself of this doctrine for two reasons. On page 516 MARSHALL, J. (reprinted in the Record at p. 71), said :

"The defendant has not brought itself within the rule announced in those cases, for it has shown no combination among assessors and no course of conduct among them to discriminate against the defendant or other telegraph companies and other property generally. It has only shown by the testimony of one member of the state board of equalization, that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value. The law contemplates that for purposes of taxation, property shall be assessed at its true value in money (Rev. St., 1899, Sec. 9180), and it also presumes that all officers do their duty (Agan v. Shannon, 103 Mo., 661 ; State v. Bank of Neosha, 120 Mo., 161 ; Matthias v. O'Neill, 94 Mo., 520). The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessors of intentional or systematic violation of duty."

A second reason advanced by the learned Judge, why this defendant could not avail itself of the defense of overvaluation and discrimination, is stated on page 517 (Record, p. 71) :

"The defendant cannot avail itself of these cases, for the reason, first, that it seeks to raise the question

of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; second, that such questions can only be raised by a direct attack in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collections of the excess restrained."

This second reason is gratuitously advanced by the Court, for the decision of the case at bar was squarely and distinctly upon the ground that this defendant had not brought itself within the rule laid down by Mr. Justice MILLER. The objection that the illegality of the assessment could not be raised in defense of this kind of a suit is as applicable to the defense that the franchise granted by the United States cannot be taxed, as it is to the defense of unlawful discrimination. Both defenses were denied by the Supreme Court in the case at bar, not on the ground that they could not be pleaded in this action, but because, in the one case, the tax upon "all other property," whether upon the franchise or not, is legal, and in the other case, because the facts did not bring the defense within the rule. Though gratuitous, the suggestion that the finding of a board of equalization cannot be attacked collaterally, will first be considered.

II.

The defendant was entitled to defend against the wrongful assessment in the present action at law to enforce the tax. A bill in equity by the defendant is not necessary in an action like the present.

In the Kentucky railroad tax case, 115 U. S., 321, it was said by Mr. Justice MATTHEWS, delivering the opinion of the Court (p. 335):

"But whatever relief courts of justice may afford against the injuries apprehended, when in fact they have resulted, is secured to the plaintiffs in error by the very statutes of which they complain. For the valuation of railroad property under that act, and the assessment of the taxes thereon, are not final, in the sense that they constitute a charge upon the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained and the tax actually collected only by suit, as provided in the fifth section of the statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Franklin Circuit Court, or in the courts having jurisdiction in the counties, for the taxes payable to them respectively. The case is thus brought directly and distinctly within the decision in Davidson vs. New Orleans, 96 U. S., 97, 104, where it was held 'that whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' * * * What inqui-

ries may be permitted in such cases, of course, is a matter that depends upon the particular provisions of the law of the jurisdiction. In the absence of such provisions, and as a principle of general jurisprudence, it is safe to say that any defense is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States."

The county collector is empowered to use all lawfu means to collect all taxes which he is required to collect in his county (Sec. 9228, R. S., Mo., 1899. See Appendix). *A suit at law is one method.* The summary enforcement of the lien by seizure of the goods liable for taxes is another. *It is in this latter extraordinary mode of enforcing payment that the tax-payer has recourse to a bill in equity. There is no occasion for a bill in equity if the collector attempts to collect the taxes by an ordinary civil suit. In such a proceeding the tax-payer may interpose as a defense the illegality of the assessment.*

In the case of *State ex rel. vs. Cunningham*, 153 Mo., 642, 654, it was held that the taxpayer could, as a matter of defense to a suit at law for the taxes, *plead those facts which would have entitled him to equitable relief.* In that case the board of equalization raised Cunningham's assessment, as they had a right to do, but they falsified the record and thus rendered the assessment void. In that case the record showed that the valuation had been increased, when, in fact, other property was added. It was held that this defense of fraud, having been established by the evidence, amounted to a compete defense to the suit, and the finding and final judgment was given for the defend-

ant. *In the Cunningham case, not a word is said about the defendant paying into Court any part of the assessment, as a prerequisite to relief from an illegal assessment.* And on general principles of law such a tender is only required when the complaint seeks affirmative equitable relief and then only on the ground that "he who seeks equity must do equity."

IN THE CASE AT BAR THE ASSESSMENT IS MADE, IN THE FIRST INSTANCE, BY THE BOARD OF EQUALIZATION. Under the provisions of Article IX., Revised Statues of Missouri, 1899, telegraph companies are assessed in the same manner that railroad companies are assessed (see Statute of Missouri in Appendix to this brief). Under the law providing for assessing railroad property, the county assessor has nothing to do with the making of the assessment. *State ex rel. Wright vs. St. Louis, Iron Mountain & So. Ry. Co.*, 82 Mo., 683.

It is difficult to understand how the Supreme Court of the State could say that this defendant "has shown no combination among assessors and no course of conduct among them to discriminate against defendant" (Rec., p. 71). The matter of assessing the telegraph companies is not one in which the county assessors have any part whatever. This board can add to, or subtract from, the value given by the telegraph company; it can add other property which it is authorized to assess and which is not listed by the company in its report to the auditor. From the report of the Board of Equalization, there is no appeal to any other body or board, and the only relief a taxpayer can obtain against an illegal assessment is to sue or be sued.

Article 10, Section 3 of the Constitution of Missouri provides,

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

SEC. 4. "All property subject to taxation shall be taxed in proportion to its value."

Section 9127 of the Revised Statutes of Missouri, 1899, prescribes the duties of the State Board with respect to general real and personal property and provides,

"It shall add to the valuation of each class of the property, real or personal, of each county, which it believes to be valued below its real value in money such percentum as will increase the same in each case to its true value" (see Appendix).

Section 9387, R. S., 1899 (see Appendix), which is the section under which the property of telegraph companies is taxed by the State Board, * * *

"all property, real and personal, including the franchises owned by Telegraph and Express Companies shall be subject to taxation for State, County, Municipal and other local purposes *to the same extent as the property of private persons*, and taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for taxation of railroad property in this State, and County Courts and the court and State Boards of Equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting taxes on the property set forth in this section, as said Courts and Boards of Equalization have or may hereafter be empowered with in assessing, equalizing and adjusting taxes of railroad property, and the president or other chief officer of any such Bridge, Telegraph or Express Company * * * is hereby required to render statements of the property of such Bridge, Telegraph or Express Company in like manner as the president or other chief officer of the Railroad Company is now or may hereafter be required to render for the taxation of railroad property."

Does this not exclude the unit rule as to telegraph companies in other States?

If the action of the Board of Equalization in assessing the property of this defendant in the one hundred and one counties of the State of Missouri where it operates lines, at more than double the value at which the county assessors assess the property of other persons, *and at more than double the value at which this same board of equalization equalizes the value of all other property in every county of the State*, is not common action, concerted action, under a rule of discrimination, it is difficult to understand what kind of discrimination would entitle the defendant to complain. It is not a case of a tax-payer in Jackson County complaining of the assessment in one isolated case. THE PROPERTY OF THIS COMPANY IS SHOWN TO HAVE BEEN ASSESSED AT THIS EXCESSIVE VALUE IN EVERY COUNTY BY THE BOARD SITTING AS AN ORIGINAL AND FINAL ASSESSING BOARD FROM WHOSE ACTION NO REVISION OR APPEAL IS PROVIDED BY STATUTE.

A tax bill is not conclusive. In actions against railroads the tax bill is not even *prima facie* evidence since, it is not made so by statute (*State ex rel. vs. Davis*, 131 Mo., 457). Since taxes levied on telegraph companies are levied and collected in the same manner as in the case of railroad property, the bill for taxes does not constitute even *prima facie* evidence. Hence the stipulation filed in this case (Rec., p. 16). Whatever may be true of the decisions of the board *sitting as a board of equalization* in respect to the decisions of that body being in the nature of judicial decisions, that same commentary cannot be passed upon the action of the board *sitting as a board of assessors*. While it is true that a mode of reviewing the decision is to be had on

a writ of *certiorari*, that writ cannot afford relief where the illegality of the assessment does not appear on the face of the record of the board's proceedings.

It is often said that the writ of *certiorari* is the only proper mode of reviewing the decision of the board of equalization. This writ, however, does not bring before the higher court any of the evidence. It brings up only the *record and proceedings*, thus presenting to the Court only the question of *formal* compliance with the law. *All questions of fraud, discrimination and abuse of discretion which affect the legality of the tax, may be raised in a defense to a suit for the collection of the tax.*

Railroad Co. vs. State, 64 Mo., 294.

Ward vs. Board of Equalization, 135 Mo., 309.
State ex rel. vs. Cunningham, 153 Mo., 643.
House vs. Clinton Co. Court, 67 Mo., 522.
State ex rel. vs. Board of Equalization, 108 Mo., 235.
State ex rel. vs. Vaile, 122 Mo., 33.

In the last-named case the Court said: "Where a board of equalization raises an assessment without jurisdiction, its action is void, and there is a good defense *pro tanto* in a suit to recover the taxes (*State ex rel. v. County Commissioners*, 14 Nev., 140); or, the collection of the taxes on the increased valuation may be enjoined (*Coolbaugh v. Huck*, 86 Ill., 600); or, if paid, may be recovered back (*Avery v. East Saginaw*, 44 Mich., 587)."

As was said in *Chicago Union Traction Co. vs. State Board of Equalization*, 114 Fed., 557, this is not a suit in equity in which the defendant, as a condition for the relief granted, may be required to do equity. It does not lie in the mouth of the State or collector

to say that a defendant cannot defend against an illegal tax because he has not tendered a sum deemed to be justly due, *because the State has taken the initiative to collect the whole of a tax based upon an illegal assessment.* If the contention were correct, the trial Judge erred in giving judgment for a part only of the tax bill, and the Supreme Court should have reversed this judgment on this ground alone.

With still less right could such a replication be made when the Courts have assumed the right to bring about the result of a new assessment by their judgments. It may be that in a suit at law such as this judgment could be given for the sum that would be actually due on a legal assessment. This defendant does not contend that it should be relieved from the payment of any taxes for the year in question. It does contend that this assessment was illegal and void. If the Courts have the power to determine what tax would have been legal and require the payment of that amount as a condition of granting relief, the Court below could have given judgment for a sum equal to the proper tax. Aside from the error in giving an instruction precluding the defendant from questioning the valuation of the tangible property (Rec., p. 12), the judgment of the County Circuit Court was in the proper form.

It may be that a Court is justified in enforcing the payment of sums equivalent to a properly levied tax to prevent the avoidance of a tax for that year by the complaining tax-payer. In the same manner that the tax on the franchise was deducted from the sum claimed the tax based on the excessive valuation should likewise have been deducted, and judgment rendered for the legitimate tax.

We conclude, therefore, that since the attempt to collect the tax is by ordinary civil suit the defendant was not obliged to resort to a bill in equity to enjoin the suit a law, because equitable defenses may be pleaded in actions of law under the Missouri Code of Civil Procedure.

III.

The valuation of defendant's poles, wires and instruments at first cost, whereas the testimony proves that through years of actual use such property had depreciated sixty per cent., was in itself gross discrimination; but the valuation of the property of all other persons, companies and corporations at forty per cent. of the actual value of such property in pursuance of a uniform and systematic practice of many years' standing, was discrimination upon discrimination, and amounted to a legal fraud upon this defendant, which entitles it to make the defense and have the relief sought in the present case.

It is a very important question, termed a *dilemma* by Judge TAFT, in a recent, well considered case, whether the constitutional command that taxes shall be uniform overrides the statutory requirement that property be assessed at its true value in money. The question is presented by a tax-payer who, it is admitted or

clearly proved, is discriminated against, and who is subject to a grossly excessive tax compared to the tax upon other property.

The dilemma arises whether the granting of relief does not recognize, and approve the violation of the statute. Citizens A, B and C are assessed and pay taxes upon property assessed at 35 to 40 or 50 per cent. of its true value. Citizen X is assessed and pays taxes upon property assessed at its full value. Every tax-payer should contribute his share of taxes needed by the State and county, but the provision of the State Constitution requiring taxes to be uniform and the provision of the Federal Constitution guaranteeing to every person that his property shall not be taken without due process of law, and securing to every person the equal protection of the law, requires that all property should be taxed in proportion to its value, that the property of A, B and C and X shall be assessed at an uniform valuation.

With the exception of the Supreme Court of Missouri, in its decision in the case at bar, no Court has refused to follow this principle, and but few Courts have hesitated to correct the evil by declaring an assessment invalid, which thus grossly discriminates against the complainant. One case from the Supreme Court of each of the States, Massachusetts, New Jersey and Ohio, has been cited as holding that a complainant whose property has been assessed at a higher proportionate value, but not at a higher valuation than the true market value, cannot ask a Court to compel the board of assessors to assess the complainant's property at less than its true value.

Those who rely upon these cases are careful to state

the propositions in that form, ignoring the fact that the proposition does not involve the precise question in this case. The theory of this defense, as well as the theory of the cases herein referred to, is not that the Court should compel the Board of Equalization to assess the defendant's property at 40 per cent. of its actual value, but rather that assessing and equalizing other property at a valuation less than half the valuation of defendant's property is a legal wrong upon the defendant.

Before considering the long line of cases sustaining the contention of the defendant in this case, it is worth while to examine these three cases and determine just what was decided in each. If the same question was not presented and necessarily decided in these cases, not a single authoritative case can be brought to the support of the truly remarkable holding of the Missouri Court.

The case of *City of Lowell vs. Commissioners of Middlesex County*, 152 Mass., 372; 25 N. E., 469, expressly holds that, in an appeal from the County Commissioner, that body had no right to consider the valuation put upon the property of other persons in proceedings brought by one tax-payer to abate his own taxes, because of over-valuation. It was held that under the statutes of the commonwealth, requiring all property to be assessed at its fair cash value, the cash value alone could be considered in determining whether there had been an over-valuation. The problem for the Court in that case was to reconcile the operations of two statutes. One statute required all property to be assessed at a fair cash valuation. Another statute gave the tax payer the remedy of having his tax abated,

if he was taxed at more than his just proportion. The statute, as quoted, reads:

"A person aggrieved by the taxes assessed upon him may apply to the assessors for an abatement thereof, and if he makes it appear that he is taxed at more than his just proportion, or upon an assessment of any of his property above its fair cash value, they shall make reasonable abatement."

Pub. St. C., 11, Sec. 69.

The meaning of this clause, as construed by the Court, is:

"The just proportion intended by the existing statutes is attained by assessing the property of different persons at a uniform rate, and upon its fair cash valuation."

In the first part of the decision, the Court said:

"A person may be taxed at more than his just proportion either because he is taxed at a disproportionate rate, or for property which he does not own, or because his property is disproportionately valued."

It is to be noticed that no question of the constitutionality of the action of the assessors was raised. The Court simply held that, construing the two statutes together, the Court must deny the taxpayer the remedy for discrimination which would apparently sanction assessing property at less than its cash value.

It may be admitted that this decision on the questions presented is correct. It cannot, however, be seriously argued that the uniformity of taxation which the law of the land, as expressed in the Constitution requires, is to be made subservient to a statute directing that all property is to be taxed at its true value in money. The fallacy lies in assuming that to relieve a taxpayer from this discrimination sanctions a violation of the revenue laws. The theory of the New

Jersey decision (*State vs. State Board of Assessors*, 48 N. J. Law, 1 ; 2 Atl., 789) is that a taxpayer who enjoins or defeats the collection of a tax based upon such a grossly unjust valuation relative to the valuation of other taxable property, is thenceforth entitled to have his property assessed at less than its actual value. Such an assumption is unfounded. Such a result is not necessarily or logically deducible from granting the relief prayed. The Court does not directly or indirectly sanction assessing property at less than its true cash value. It does put the stamp of disapproval upon undervaluation. The decision does not encourage undervaluation of property, for, by compelling uniformity, it makes it easier for the proper authorities to compel the State officers to assess all property at its actual cash valuation.

In the New Jersey case, *supra*, it appeared that the local assessor rated property much below its true value. The State board rated corporate property at its true value. BEASLEY, C. J., said :

> " The local officers disobeyed the injunction of the law, and the contention is that the state officers should have pursued the same forbidden course, and that these acts should now be declared to be abortive because they refused to perpetrate such a malfeasance. Such an argument in our estimation, has no force whatever, and, indeed, it seems a novel suggestion that a court should annul a proceeding because such proceeding conforms to the law."

This part of the opinion appears to be *obiter*, for the case came before the Court on *certiorari*. The opinion, if intended to apply to such a case as the one now before the Court, misconceives both the purpose and effect of the setting aside of the assessment. The purpose is not to annul a law, as was evidently thought by

BEASLEY, C. J., since he follows the above quoted remark with a quotation from Mr. Justice MILLER'S opinion in *Cummings vs. National Bank*, 101 U. S., 156, to the effect that the unfaithful administration of a law will not render the law unconstitutional.

Nor does the complaining taxpayer seek to have the board's action declared abortive because they do not follow their action in other cases, to perpetrate such a malfeasance. The "malfeasance" began when other people's property was assessed at the very low proportion of its true value, but the unlawful discrimination of which the taxpayer complains was completed when he was required to pay taxes upon a valuation very much in excess of the valuation on other property. The taxpayer complains of the consequence of the board's so-called malfeasance, and the Court granting the relief prayed, does not declare the board's conduct abortive in not continuing the malfeasance. The granting of the relief is neither a condemnation nor approval of undervaluation when uniformly practiced; indirectly it condemns the practice.

In *Waggoner vs. Loomis*, 37 O. St., 571, the Supreme Court of Ohio refused to give any relief to a taxpayer whose property was assessed at less than its true value, but about double the value placed on other property in the county. A number of reasons were adduced why the relief should not be granted. It was said that granting the relief would perpetrate a greater wrong upon the taxpayers in "the other eighty-seven counties of the state, where all property, including shares of bank stock, has been assessed according to its true value in money, and upon which the rate required for state purposes has been paid."

However material this circumstance in the case may

be, it does not appear in our case that granting relief to this defendant casts any burden upon any other person. In the Ohio case, however, another circumstance, which may be deemed conclusive, appeared, which does not appear in our case. In that case no fraud, conspiracy, mistake of law or unfaithfulness in the conduct of the officers of the law was charged, and for all that was alleged, the Court could not say but that the difference in valuation was a mistake or error of judgment. It is true McIlvane, J., says in the opinion that even in such cases as *Pelton vs. Bank*, 101 U. S., 143, and *Cummings vs. Bank*, 101 U. S., 153, equity will not afford relief to a complainant who cannot show that the burden imposed on him is greater than it would have been if the laws had been faithfully executed by the taxing of all property by a uniform rule and according to its true value in money. But this remark, if intended as a qualification of *Cummings vs. Bank*, is a *dictum* which the later cases in Federal and State Courts have not followed. The Ohio case does not stand as an authority against the granting of relief to the defendant in this case.

In Illinois the Constitution provides that the General Assembly may tax corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates (Const. 1870, Art 9, Sec. 1). In *Chicago Union Traction Co. vs. State Board of Equalization*, 114 Fed. 557, 563, a case growing out of *People vs. State Board of Equalization*, 191 Ill., 528; 61 N. E., 339, Grosscup, J., held that until the legislative will is thus exercised all the property of the State is to bear uni-

formly the burdens of taxation, and that in calculating the capitalization of such corporations for the purpose of taxation, the standard deliberately adopted by the State Board of assessing all other property throughout the State at seventy-five per cent. of its cash value, could not be disregarded in assessing the property of these corporations.

In an earlier case, reported under the same title, 112 Fed., 607, it was held (*per curiam*) that the attempt to enjoin the State Board of Equalization before it had acted was premature. The case of *The People vs. the State Board of Equalization* (Ill.), 61 N. E., 339, was approved, and this encouragement, which led to the later decisions in 114 Fed., 557, was given:

"If it transpires that the board of equalization, through pique or under the lash and spur of some external power, or through personal fear, or moved by any consideration than the impartial and independent discharge of its own duty, attempts to certify an assessed valuation that in its effect would be a fraud upon any taxpayer, the courts still remain open to the injured taxpayer."

The defendant in the case at bar contends that the enforcement of the judgment of the Supreme Court of Missouri in this case would amount to the taking of private property without due process of law, and also to a denial of the equal protection of the law, a violation of the Fourteenth Amendment of the Constitution of the United States.

Quoting from the opinion of Judge GROSSCUP, in *Chicago Union Traction Co. vs. State Board of Equal-*

ization, supra (p. 565), we state the right for which we now contend:

"Taxes are enforced contributions, levied by the state upon the property of individuals by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is, as much as real estate and chattels, property within the meaning of the Constitution of the United States; and the taking of such property is a taking of property, as much so, for instance, as the taking of private land for some public work authorized by some law of the State or of Congress.

"Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards or of men.

"Any substantial departure, therefore, in the collection of taxes, from the law, either as authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distribution of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law.

* * * * * *

"We have no doubt that complainants may intrench themselves against this invasion by the writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—but they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the constitution must not be emasculated."

THE GREAT WEIGHT OF AUTHORITY approves the defendant's contention that it should be relieved from this grossly discriminating assessment. From the decisions of the State courts we select the following that

have unequivocally upheld the doctrine of *Cummings vs. National Bank* and *Taylor vs. Louisville and Nashville R. Co.:*

ARKANSAS: *Ex parte Ft. Smith and Van Buren Bridge Co.*, 62 Ark., 461; 36 S. W., 1060.

CALIFORNIA: *Los Angeles Co. vs. Ballerino*, 99 Cal., 597; 32 Pac., 583; 34 Pac., 329. *Pacific Postal Co. vs. Dalton*, 109 Cal., 604; 51 Pac., 1072.

CONNECTICUT: *Randall vs. City of Bridgeport*, 63 Conn., 321; 28 Atl., 523.

ILLINOIS: *Board of Supervisors vs. Railroad Co.*, 44 Ill., 229.

IOWA: *Iowa and Dakota Tel. Co. vs. Schauber*, 91 N. W., 78.

KANSAS: *C. B. & Q. R. Co. vs. Board of Comrs.*, 54 Kan., 786; 39 Pac., 1039.

MICHIGAN: *Merrill vs. Humphrey*, 24 Mich., 170. *Walsh vs. King*, 74 Mich., 350; 41 N. W., 1080.

NEBRASKA: *State ex rel. vs. Savage* (Neb.), 91 N. W., 557.

NEW HAMSPHIRE: *Manufacturing Co. vs. Strafford*, 51 N. H., 455. *Manchester Mills vs. Manchester*, 58 N. H., 38.

NEW YORK: *Mercantile Natl. Bank vs. Mayor, etc., of New York*, 64 N. E., 756.

TENNESSEE: *City of Chattanooga vs. Railroad Co.*, 7 Lea, 563.

WISCONSIN: *Weeks vs. City of Milwaukee*, 10 Wis., 242. *Hersey vs. Supervisors*, 16 Wis., 185. *Lefferts vs. Supervisors*, 21 Wis., 688. *Iron Co. vs. Hubbard*, 29 Wis., 52. *Hersey vs. Board of Supervisors*, 37 Wis., 75.

Cooley on Taxation, 2d ed., pp. 748, 785.

Judson on Taxation, Sec. 478.

Welty on Assessments, Sec. 186.

The Doctrine of this Court and of Other Federal Courts and the Effect of the Fourteenth Amendment as to Discriminating Assessments. Under this Doctrine the Telegraph Company's Defense Ought to Have Been Sustained.

In *Cummings vs. National Bank*, 101 U. S., 153, the officers charged with the valuation of property for taxation in Lucas County, Ohio, where the bank was located, adopted a settled rule or system by which the real and personal property was assessed at *one-third its value and moneyed capital at three-fifths of its value*, and the State Board of Equalization increased the valuation of bank shares to their full value. One-third of the tax the bank paid and then brought suit in the United States Circuit Court to restrain the collection of the remainder. The Court held that the tax was illegal, because the valuation of the property was unequal and in violation of the constitution of the State, which provided for the taxation of all property by a uniform rule, according to its true value in money. Said Mr. Justice MILLER, in giving the opinion of the United States Supreme Court:

"It may be summed up in the statement that the assessors of real property, the assessors of personal property and the auditor of Lucas County, in which is the city of Toledo, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one-third of its actual value, and money or invested capital at six-tenths of its value, and that the assessment of the shares of incorporated banks as returned by the State Board of Equalization for taxation to the auditor of Lucas County, was fully equal to the selling prices of said shares and to their true value in money. * * * All this is uncontradicted. The constitutions and statutes of

nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. * * * *But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.* And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual values, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason of this common consent to substitute a custom for a positive rule of the statute, it will probably be found in the difficulty of subjecting personal property and especially invested capital, to the inspection of the assessor and the grasp of the collector. * * * But whatever may be the cause, when it is recognized as the source of manifest injustice to a large class of property around which the constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy."

One of the earliest cases decided by a Federal Court is *County of South Clara vs. Southern Pac. R. Co.*, one of the six California tax cases reported in 18 Federal Reporter, page 385. The opinion was written by the late Mr. Justice FIELD. The case expresses very clearly the relation of the Fourteenth Amendment to the power of taxation in the State. In the California cases the State Constitution provided that the taxation of property should be in proportion to its value. One of the defenses to the action at law to recover unpaid taxes was that the mode of assessment violated the Fourteenth Amendment to the Constitution of the United States. In that case, as in our own, the State Board of Equalization performed the two functions of equalizing the assessments made by the county boards, and of assessing the franchises and

property of railroads as an original assessing board. Its action in the latter character must also be upon prescribed rules of notice. But though the officers by whom the assessment of these properties is to be made are different, the properties are subject to the same rule of taxation—that is, they are to be fixed in proportion to their value (18 Fed., at 391).

In the California case the tax-payer complained that its property was valued in a manner different from that adopted for other property. It was held that if any element was taken into consideration in one case which was omitted in the valuation of the property of another, the discrimination made against one and in favor of another destroys the uniformity so essential to all just and equal taxation. Our contention is convincingly argued in the language of Mr. Justice FIELD on page 395 :

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value, at a half or a quarter of it, and the property of another at more than its value, at double or treble of it, according to the will or caprice of the State. * * * To levy taxes upon a valuation of property thus made is of the very essence of tyranny and has never been done except by bad government in evil times, exercising arbitrary and despotic power."

* * * * * *

"It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppression, and the cause of more commotions and disturbances in society, of insurrections and revolutions, than any other cause in the world" (p. 399),

* * * * * *

"With the adoption of the [14th] amendment the power of the States to oppress any under any pretense or in any form was forever ended; and henceforth all

persons within their jurisdiction could claim equal protection under the laws."

* * * * * *

"*That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation.*"

* * * * * *

"It would, indeed, as counsel in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world if the amendment were to be read, as contended it does, in law: Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*"

The host of authorities in accord with the California case, leaves no doubt or question unsettled. In the more recent cases, *Taylor vs. Louisville & N. R. Co.*, 88 Fed., 350, and *Traction Co. vs. State Board of Equalization*, 114 Fed., the United States Court of Appeals has applied the doctrine advanced in Justice SAWYER'S concurring opinion *in the California case to the problem* raised in this case. Justice FIELD, on page 442 of Vol. 18 Federal Reporter, *speaking of the nature of an action at law to recover taxes and of the right to make defense thereto*, said:

"This action is not based upon moral equities, or even upon equities recognized and enforced by courts of equity. It is a dry action at law to recover what is alleged to be a sum of money *legally* due and for which the defendant is *legally*, personally, liable by reason of a valid levy of a tax against it. That is the cause of action alleged and upon that a recovery must be had, if at all, and according to the *allegata* of the complaint. This is not a suit in equity to enforce a lien for a tax. It is not an application for an injunction

against the collection of the tax, in which, possibly, the court might consider whether there were any equities which should call upon it to deny the injunction or relief affirmatively sought. It is not a case for the exercise of discretion. It is an action resting upon a strictly legal personal liability. It is not enough that a valid tax, to some extent, might have been levied. There must be such a tax as throws a legal liability upon the defendant to pay to the plaintiff the sum claimed or there can be no recovery."

It has been frankly admitted by the Missouri Supreme Court that,

" the exemption of the property of an individual or of a private corporation from taxation either in whole or in part, casts an unusual and inequitable burden on the property of those who have not been thus graciously favored."

SHERWOOD, C. J., in *State vs. Hannibal & St. Joseph R. Co.*, 75 Mo., 208, 211.

The provision in the Statute of Missouri empowering the State Board of Equalization to assess the property of telegraph companies in the first instance has been upheld by the Supreme Court of the State and also by the Federal courts.

State ex rel vs. Severance, 55 Mo., 378.

Though the property of one person is assessed by one person, and another kind of property is assessed by another person, the mode of assessment must be the same for both Boards of Assessors. A system of taxation prescribing different modes of taxation for different persons destroys equality and uniformity and denies to the person bearing the greater burden the equal protection of the law.

Railroad Tax Cases, 13 Fed., 722.

County of Santa Clara vs. Southern Pac. R. Co., 18 Fed., 385.

If this is true in the case of two distinct and independent assessing bodies, who intentionally adopt different rules of valuation, **it certainly is true in this case where the board which equalizes assessments made by the local assessors and which consequently has official knowledge of the rule and mode of assessment, also acts as an original assessing board and adopts the different rule that operates so unjustly and disproportionately upon the defendant.**

In the case of *Taylor et al. vs. Louisville & N. R Co.* (60 U. S. App., 166; s. c., 88 Fed. Rep., 350) suit was brought by complainant against State officers to enjoin them from certifying a tax, which they claimed to do by authority of the State. It appears that the State Board of Equalization assessed, for purposes of taxation, the complainant's property at 75 per cent. of its actual value, while on all other property there was placed a valuation of 25 per cent.

Under the constitution of Tennessee it was provided that all property should be taxed according to its value, to be ascertained as the Legislature should direct, so that taxes should be equal and uniform throughout the State, and no one species of property from which a tax may be collected should be taxed higher than any other species of property of the same value. It was held that equity will not enjoin an assessment of property at its full value on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers intentionally and habitually violate the law by

assessing property at less than its true value; but it need not affirmatively appear that they did so with intent to injure complainant and his class of tax-payers.

The opinion by Judge TAFT is a complement to that of MR. Justice FIELD. He said:

"There has been much discussion at the bar upon the point whether the constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage—say 75 per cent. of its real value. * * * The constitution expressly gives the legislature the power to prescribe that all property shall be assessed at its true value, and the legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case—to-wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendant to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the constitution itself.

"The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all the property in the State. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species.

"We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the constitution forbidding discrimination in taxation between different species of property. * * * The question presented is, then, whether, when the sole object of an article of the constitution is

being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent. and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer.

"The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purposes they were intended to subserve."

After reviewing at length the cases of *Randall vs. Bridgeport* 63 Conn., 321; *Cocheco vs. Strafford*, 51 N. H., 455; *Board of Supervisors vs. Chicago B. & Q. Ry. Co.*, 44 Ill., 229; *Chicago B. & Q. Ry. Co. vs. Board of Commissioners of Atchison Co.*, 54 Kan., 781; *Ex parte Ft. Smith vs. Van Buren Bride Co.*, 62 Ark., 461; and *Cummings vs. National Bank*, 101 U. S., 153, the Court continued:

"The case before us cannot in any material respect be distinguished from the Cummings case. In this

case, as in that, the injunction sought is against the enforment of an assessment upon complainant's property which was made at the true value of the property in accordance with the mandate of the constitution and statute, by assessing officers who had not discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the State to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the constitution."

What follows is especially pertinent to the mistaken position taken by the Supreme Court of Missouri in this case (Rec., p. 75) and urged by the counsel for the plaintiff:

"It has been pressed upon us that such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings case, and that upon these circumstances the Cummings case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896, intentionally equalized all real estate in the State at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this?"

[This is equally true in the case now under argument.]

"It is further said that, before the remedy pursued in the Cummings case can become applicable, it must

appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating against the complaining taxpayer and his class, and that no such case is presented to this court.

Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the Cummings case the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a State board of equalization. An intentional undervaluation of a large class of property when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equilization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the State burdens. Their undervaluations of property have been uniform as to all property in their county but railroads."

[This is precisely the case as respects telegraph property in Missouri.]

"They could not but know that such undervaluations must work an injustice against the property of railroads, if assessed at its true value by a State board and taxed for county and State purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily 'designed to operate unequally,' within the meaning of Mr. Justice MILLER in the Cummings case. The *ratio decidendi* of that case is to be gathered from the facts and the language of the opinion is to be interpreted in view of the facts. The case has been commented on

by the Supreme Court in a number of subsequent cases, but it has never been modified or overruled."

The Court then considered the following apparent exceptions : *Bank vs. Kimball*, 103 U. S., 732 ; *Supervisers vs. Stanley*, 105 U. S., 305 ; *Stanley vs. Supervisers*, 121 U. S., 550 ; *Bank vs. Perea*, 147 U. S., 87, and, continuing, said :

" We find nothing in these cases which should change our view, already expressed, of the effect of the Cummings case. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property ; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained ; that, in other words, what may be called ' sporadic cases of discrimination ' cannot be remedied by the chancellor. * * * **If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fraud or intentional discrimination."**

This case was decided by the United States Court of Appeals. *It precisely covers the case at bar.* It seems to have the specific approval of this Court for on *application for a writ of certiorari, the writ was denied by the Supreme Court of the United States (172 U. S., 647).*

This decision seems to leave little room to doubt the application of the doctrine which prevails in the Sixth, Seventh, Eighth and Ninth Circuits to the facts of this

case. In the present case a flagrant intentional discrimination has been made by officers of the State, the same officers who finally determined at what proportion of its true value *all* property in the State shall be assessed.

The whole responsibility for the illegal discrimination rests upon the State Board of Equalization. They had the power and it was their duty to have corrected it.

The uncontradicted testimony of the Secretary of the State, one of the members of the State Board of Equalization for the last eleven yeaas, is that, while property of telegraph companies was assessed at its true cash value, other property in the State was assessed at but 40 per cent. of its true value. The cases hold that it is not necessary that the discrimination be the work of one board of assessors, that the intentional discrimination due to the adoption of different modes of assessment by two boards of assessors is in violation of the uniformity guaranteed by the fourteenth amendment. By much the more is it conclusively shown that the discrimination in this case is the result of the deliberate adoption by the State Board of two different rules of valuation when a member of that board which performs the two functions declares that the **board endorses one rule when equalizing assessments of all property throughout the State, and another when assessing telegraph property as an original assessing board.** The defendant does not complain because, as to it, the revenue law, as to the mode of valuation, is literally enforced, nor would a judgment declaring the tax unjust, illegal and void amount to a judicial sanction of under valuation.

The defendant's defense is not based upon a demand that the revenue law be violated also in its case, but upon the demand that it should not be compelled to bear an unjust proportion of the burden of taxation. It must be remembered that this discrimination is not the result of enforcing the revenue law in one case, but rather the result of not enforcing it in other cases. The defendant's contention is the very opposite of that which BEASLEY, C. J., stated in the New Jersey case.

The discrimination complained of in the case at bar can be described in several ways as occurring in several different ways, according to one's point of view. It is the result of the conduct of the assessors throughout the State, who by concerted unfaithfulness, assess personal property at but 35 or 40 per cent. of its true value, and thus produce the inequality of burdens. Again, this inequality is brought about and consummated and made final and effectual by the Board of Equalization in equalizing the value of property throughout the State at 35 or 40 per cent. of its true value, while defendant's property is assessed at 100 per cent. of its true value. Conversely an inequality is the result of the acts of the board of equalization in assessing the defendant's property at 100 per cent. of its true value, when the local assessors have assessed other property at but 35 or 40 per cent. of its true value, or the board of equalization produces the inequality and discrimination by assessing defendant's property at 100 per cent. after having established the rule of equalizing the assessments upon all other property upon the basis of a 35 or 40 per cent. valuation.

If the acts of the local assessors in having one rule

of valuation while the board of equalization sitting as an assessing board has another, is wrong, certainly the discrimination resulting from the use of two different rules by *the same board*, is an evil which can be remedied. **Such discrimination cannot possibly be the result of an error of judgment.**

An earlier case than the *Taylor case*, decided in the same circuit, is *Trustees Cincinnati Southern Ry. vs. Guenther*, 19 Fed., 395. In that case the question of the unconstitutionality of a tax on railroad property when the valuation of railroad property was higher than the valuation of other property, was raised. KEY, J., said, page 398:

"Mere inequalities in taxation will not vitiate a tax if they be accidental and unintentional. These must occur under any system of assessment, and especially under that in force in this State, in which every civil district and ward has its own assessor. There will of necessity be many instances in which property will be assessed at more than its value, and more, perhaps, in which it will be assessed at less than its value. These errors and discrepancies will not vitiate the tax: they are inevitable. **But a different result follows should a standard of valuation be used for one species of property which is different from that used for another, if the end reached necessarily is the taxation of the one species higher than the other.** The constitution of Tennessee establishes that 'all property shall be taxed according to its value,' that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value (Article 2, Sec. 28). With something of iteration the principle emphasized that taxation shall be equal and uniform. If unjust

discrimination and difference is made, the tax so imposed may be restrained and its collection prevented" (citing *Pelton vs. National Bank*, 101 U. S., 143; *Cummings vs. National Bank*, 101 U. S., 153, and *Chattanooga vs. Railroad Company*, 7 Lea, 563).

Beginning with the *Railroad Tax Cases* the Federal courts have uniformly held to the principles of *Cummings vs. National Bank*, whether the question arose regarding the assessment of railroad shares or national bank shares. Some of the cases decided in the sixth, seventh, eighth and ninth circuits are:

Second National Bank vs. Caldwell, 13 Fed., 429.
Railroad Tax Cases, 13 Fed., 722.
In re Watson, 15 Fed., 511.
California Tax Cases, 18 Fed., 385.
State of Indiana vs. Pullman Palace Car Co., 16 Fed., 193.
Dundee Mortgage Co. vs. School Dist. No. 1, 21 Fed., 151.
Dundee Mortgage Co. vs. School Dist. No. 1, 24 Fed., 197.
Taylor vs. Louisville & Nashville R. Co., 85 Fed., 302.
Taylor vs. Louisville & Nashville R. Co., 88 Fed., 350.
Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557.

The case of *Ward vs. Board of Equalization*, 135 Mo., 322, 323, expressly admits the soundness of the doctrine of *Taylor et al, vs. Louisville & Nashville R. Co., supra*, but denies the application to that particular case. In that case the plaintiff complained of the law under which the board of equalization of a county acted. The case came before the Circuit Court of the

county on a writ of *certiorari*. Under the rule established by *Railroad Co. vs. State*, 64 Mo., 294, the question of abuse of authority by the board was not, and could not have been raised. The case stands for no more than this, that a law is not to be adjudged unconstitutional because officials acting under it *may* abuse the discretion vested in them.

The Supreme Court of Illinois has recently held that an assessment may be impeached because the property has been assessed too high (*State Board of Equalization vs. People*, 191 Ill., 528, 61 N. E., 339). In this case the assessment was set aside as void. HAND, J., said:

"While it is true that fraud will not be presumed and that the decision of the state board of equalization in fixing the value of corporate property for the purpose of taxation is quasi-judicial in its nature, still when it is apparent to the court that every well known rule for the valuation of capital stock, including franchises, has been violated and arbitrarily disregarded by the board, and such board has refused to consider the statements as to values prepared by the assessors, under the statute for its use, and has refused to consider information as to the value of such corporate property submitted to it by interested parties, and has arbitrarily fixed such assessments at a grossly inadequate sum *under the rules passed by it for the occasion*, the court is justified in holding that fraud in the making of such assessments has been established and such pretended assessments may be properly disregarded and treated as no assessments, and such boards may be coerced by the writ of mandamus to assess such property."

The action of the board can always be impeached upon the ground of fraud and discrimination, by the taxpayer.

Hotel Co. vs. Liebe, 33 Ill., 602.
Railroad Co. vs. Cole, 75 Ill., 591.

"It was held in *State Board of Equalization vs. People, supra*, that, "The State Board of Equalization has power to pass such rules for ascertaining the fair cash value of the stock of corporations, including franchises, as it may deem equitable and just, *provided such rules are not inconsistent with the constitution or the revenue act*" (61 N. E. 346. The italics are our own).

In that case the State Board formally adopted a new rule for the ascertainment of the cash value of the capital stock of certain corparations. In this case practically the same thing was done. A rule was adopted which discriminated between telegraph companies and other persons so that either the assessment of the telegraph company, or that of the ordinary individual, was absolutely unconstitutional and void, because in violation of the provisions requiring *all property subject to taxation to be taxed in proportion to its value* (Art. 10, Sec. 3 of the Const. of Mo).

The doctrine of *State Board of Equalization vs. People, supra*, and *State ex rel. vs. Cunningham*, 153 Mo., 502, makes the answers of the defendant in this case a complete defense. It is established beyond the least doubt that property generally is assessed at about forty per cent. of its actual value. According to the testimony of ALEXANDER A. LESUEUR, Secretary of State for eleven years previous to the taking of his deposition, it is the rule of the board to assess property at about forty per cent. of its actual value, generally, but that in St. Louis the property is assessed at fifty per cent. of its value (Rec., p. 23).

The presumption is that the property of the Western Union Telegraph Company was assessed at its full cash value, and such presumption is borne out by the

testimony of the members of the Board of Equalization. MR. LESUER, Secretary of State, testified that

" the assessment would have to stand upon the language used by the board itself, which language taken from the report of the board, the witness made his own. According to this report, the board received evidence concerning and considered, the value of the cost of construction of said telegraph line and the market value and par value of the stocks and bonds and of the gross receipts and net earning power and the franchise and value thereof * * * in arriving at actual cash value of said telegraph company " (Rec., p. 19).

This same witness testified that during the past five years, the real and personal property throughout the State had been assessed at the average valuation of about forty per cent. (Rec., p. 23). The certified copy of the record of the proceedings of the Board of Equalization was admitted as evidence, and the members of the board adhered to this report throughout as their testimony. This report states unequivocally that the board, after considering certain things which " would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company," assessed and valued the said property at $1,827,727.45. The gross discrimination is admitted by the report and testimony of the members of the board. In addition MR. COOK testified, and his uncontradicted testimony (giving specific data), demonstrated that the property was assessed at more than its actual cash value. In short, the uncontradicted evidence is that the property of the plaintiff in error was *intentionally* assessed at at least one hundred per cent. of its value. And the property of all others was *intentionally* assessed, and that as-

sessment *intentionally* approved by the State Board at 40 per cent. of its true value (Rec., p. 71).

MARSHALL, J., in the opinion says of their testimony:

"It has only been shown by the testimony of one member of the State board of equalization that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (Rev. St., 1899, Sec. 9180), and it also presumes that all officers do their duty. * * * The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessor of intentional or systematic violation of duty."

The learned Judge certainly forgot that the witness was a member of the Board of Equalization, which, under the Missouri statutes, performs the two functions of equalizing assessments made by the County Courts, and *assessing originally railroads*, telegraph, telephone, bridge and express companies, and that *he spoke of his own knowledge, not of his opinion, concerning the assessed value of ordinary property.* What could be more conclusive than the admission, the uncontradicted admission of a member of this board, that the property of the defendant was assessed at a 60 per cent. higher value than ordinary property?

The other objection mentioned in the opinion, that this defendant shows but one isolated instance of discrimination, does not deserve consideration; for the record shows that this discrimination extended to $971,326.89 of tangible property and $856,400.56 of "all other property" which is deemed the "franchise

valuation" by the then Secretary of State. If this defendant were the owner of *all* property used in conducting a telegraph business in this State the learned Judge would be obliged to make the same objection, if he deems it a substantial one.

The objection that one cannot complain because his property is assessed at its full market value, while other propety is assessed at 35, or 40 or 50 per cent. of its actual value, is most hesitatingly made in the one sentence :

" The law contemplates that, for purposes of taxation, property shall be assessed at its true value in money ; * * * and it also presumes that all officers do their duty " (Rec., p. 71).

In none of the cases of discrimination and fraud is this considered a substantial objection. As was said by TAFT, J., in *Taylor et al. vs. Louisville & N. R. Co.*, 88 Fed., 350 :

" The court is placed in a dilemma from which it can only escape by taking that path which, while it involves a nominal departure from the law, does injury to no one, and secures that uniformity of tax burden *which was the sole end of the constitution.*"

In the recent case of *State ex rel. vs. Savage et al.* (Neb.), 91 N. W., 716, HOLCOMB, J., said :

" The object of the law of uniformity is accomplished if all property within the taxing jurisdiction is assessed at a uniform standard of value, as compared with its actual market value, even though there be a great disparity between values as assessed for taxes and the value as fixed in the open markets by barter, exchanges or by buying and selling, and other commercial transactions in which values and prices enter as important factors. * * * Thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis."

In accord :

Bureau Co. vs. Chicago B. & G. C. Co., 44 Ill., 229.

As was said by the late Chief-Justice Doe in the case of *Cochico Co. vs. Strafford*, 51 N. H., 455, 482 :

" The common practice of undervaluing real estate for the purposes of taxation, may have led the legislature to employ an unusual number of synonymous words, not to convey their meaning, but to impress it upon selectmen. Whatever the object of the tautology, it does not modify the legal or the natural interpretation of the word 'appraise.' If the legislature had said, 'the selectmen shall appraise all taxable property, and stopped there, it would be the duty of the selectmen to appraise all taxable property at what it is worth ; and that duty is emphasized, not changed by the other words of the statute" (* * **full and true value in money*).

" The statute provides that when a taxpayer properly applies by petition for an abatement of a tax, the court shall make such order thereon as justice requires (Gen. Stats., Ch. 53, Sec. 11). Justice requires an equal rate of taxation of Strafford real estate. **If the Strafford real estate and others was appraised, in 1870, at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiff shall pay their proportion of tax and no more. The usual rate in farming is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford.** When the commissioners have ascertained the fact of the full value of the plaintiff's Strafford real estate, on the first day of April, 1870, they should proceed further, and appraise it at its value compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

The opinion was approved in the later case (*Mills vs. Manchester*, 58 N. H., 38).

In the answer of the defendant (Rec., pp. 8–10) it is specifically charged that the personal property of defendant was intentionally and fraudulently assessed at a higher valuation than other personal property of the same class in the State, and the testimony established beyond question that the defendant was assessed in utter disregard of any attempt to secure uniformity. The initial error was made by the trial court in giving the plaintiffs' instruction numbered 2, thus barring out any inquiry into the fraudulent and arbitrary action of the board (Rec., p. 55). The error was aggravated by the Supreme Court of the State in affirming the judgment of the trial Court after declaring that the evidence was insufficient to bring the case within the well-recognized rule. It was also error to base the denial of the right to question the board's decisions on the ground that the defendant had not formally tendered or offered to tender into court any specific sum deemed to be due. If that were true, there was no occasion for the Court to pass upon the constitutionality of the franchise tax, or upon the proof necessary to prove an unlawful descrimination. Apart from that criticism of the Court's error, the nature of the suit and the character of questions involved precluded a formal tender of any sum, especially when in this kind of a suit judgment could be rendered for the sum legally due, if any.

If the taxpayer had taken the initiative by a bill in equity to prevent the collection of the tax, it might have been urged, as a just condition, that it offer to pay what was clearly due, because in any decree no

judgment for the sum could be given. In this case the State took the initiative. The action is such that it could not fail to recover what was justly due under a legal assessment. This appears to be recognized in one part of the opinion of the Supreme Court, for in reversing the judgment of the trial Court wherein the claims of the plaintiff were cut down from $1,027.22 to $605.82 the reversal is not put upon the ground that defendant could not attack the judgment of the Board of Equalization without first tendering the sum thought to be actually due, but upon the purely legal ground that the tax was legal and constitutional. This very inconsistency shows that the objection to defendant being heard to question the board's judgment must be more substantial than the practice in equity proceedings, where conditions may rightfully be imposed to avoid multiplicity of action. In a suit at law, the defendants' contention requires neither the judicial approval of under valuation in assessing property nor depriving the State of the amount of taxes legally due.

IV.

With but few exceptions, the Supreme Courts of all the States in which the question has arisen have upheld the constitutional guarantee of equality and uniformity rather than make a few individuals or corporations bear the burden of what Mr. Chief-Justice Beasley termed the assessor's malfeasance.

Judson, in his late excellent work on taxation, made this deduction from the recent decisions of Judge

TAFT and Judge GROSSCUP (the last sentence is italicised to call to mind the contention that the defendant's complaint is of an isolated case):

"It follows, therefore, that, where there is habitual and intentional discrimination in the valuation of property, resulting in substantial inequality of taxation, there is a denial of the equal protection of the laws. The discrimination must not be sporadic or occasional, but substantial—that is, relative undervaluation must extend to a large class of individuals or corporations, and not solely to one individual or corporation. *It is immaterial, however, that the discrimination is aimed only against one individual or class, as the equal protection of the laws requires that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and other classes in the same place and under like circumstances.*"

Judson on Taxation, Sec. 478.

It cannot be denied that the testimony showed the discrimination to have been not merely a sporadic or occasional occurrence, but rather the settled policy of the board for years past.

In the opinion of the Missouri Supreme Court it is said that the defendant "has only shown by the testimony of one member of the state board of equalization that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value,' and that "the law contemplates that, for purposes of taxation, property shall be assessed at its true value in money." The Court likens the case to one where a stranger states that, in his opinion, one man's property is assessed at 40 per cent. of its true value, while another's property is assessed at its full value. *Such is not this case.* By statute the one Board of Equalization performs two functions. It would be straining the formalism of our law to insist that a member of this board could not in

the one examination testify as to what he knows officially in both capacities. There is no better evidence of the proportion of its true value at which ordinary property is assessed than the testimony of the oldest member in point of service, of the Board of Equalization. The Court would convey the impression that the witness was testifying as to the conduct of the local assessors alone or that he had deliberately falsified.

Case Summarized.

We have, then, concerted action upon the part of State officers acting under State laws which authorize an assessment, in which the defendant is intentionally and unjustly discriminated against. We have the case of a state law so administered that the property of the defendant is taken in violation of the constitutional guarantee of equal protection of the law. We have the case of the State by its duly authorized officers attempting to enforce this unjust burden upon the defendant in a suit at law. We have the case of officers of the State willfully and intentionally departing from the rule adopted for the valuation of the great mass of personal property in the State, in consequence of which this defendant bears a greater burden than his neighbor. It is submitted that no stronger case can be found for the application of the well established rule:

> A public officer who is empowered by law to apportion certain burdens among the citizens of a State as in his judgment shall be just, must perform that task by the exercise of his best discretion. If he is actuated by a fraudulent purpose and instead of obeying the law, disregards its man-

> date, declines to bring his judgment to bear upon the question submitted to him, and arbitrarily, and with express reference to defeating the ends to which the law aims, determines to impose an excessive burden upon a particular citizen, he thus commits a wrong which is subject to the law's correction.
>
> Opinion of COOLEY, J., in *Merrill vs. Humphrey*, 24 Mich., 170.

The fact that the law permits an officer such latitude that he may exercise his discretion in an arbitrary and capricious manner does not make the law unconstitutional, but the acts of the officer are in violation, if not of the law itself, of the constitutional guarantee that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The arbitrary and intentional departure from the accustomed mode of assessing personal property by the Board of Equalization was an act of the State which, if permitted by the Court, will amount to a taking of property in violation of the highest law of the State; it will amount to a more serious violation of the constitutional guarantee of the equal protection of the laws. The judgment of the Supreme Court of the State in sustaining the effort of the State to collect a discriminating tax is itself an act of the State in violation of the fourteenth amendment.

We submit that the judgment of the Supreme Court of Missouri ought to be reversed.

ELENEIOUS SMITH,
ALEXANDER NEW,
For Plaintiff in Error.

JOHN F. DILLON,
HENRY D. ESTABROOK,
Of Counsel.

APPENDIX.

State and Federal Statutes Involved in this Case.

ACT OF CONGRESS.

United States Telegraph Act of July 24, 1866.

(Stats. at Large, Vol. 14, p. 221).

"AN ACT to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, being *Title LXV.* of the U. S. Rev. Stat (p. 1019).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Sec. 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by an Act of Congress, and over, under or across the navigable streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to

obstruct the navigation of such streams and waters and interfere with the ordinary travel of such military or post-roads.

And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses, in the construction, maintenance and operation of said lines of telegraph and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its lines of telegraph may be located, as may be necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall, in their transmission over the lines of any of said companies, have priority over all other business and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted that the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association or person; provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this Act for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies, at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. And be it further enacted that before any telegraph company shall exercise any of the powers or privileges conferred by this Act such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this Act."

Missouri Statutes.

"SEC. 9387. BRIDGES AND TELEGRAPH AND EXPRESS FRANCHISES TAXABLE—DUTIES OF COUNTY COURTS AND BOARDS OF EQUALIZATION.—All bridges over streams dividing this state from any other state, owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph and express companies, which shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts and the county and state boards of equalization are hereby required to perform the same duties and are given the same power in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have, or may hereafter be empowered with, in assessing, equalizing and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph or express company, or the owner of any such toll bridge is hereby required to render statements of the property of such bridge, telegraph or express company in like manner as the president or other chief officer of the railroad company is now, or may hereafter be, required to render for the taxation of railroad property" (Rev. St. of Missouri, 1899), Vol. 2, Chap. 149, Art. IX., p. 2181).

Section 9360.

"SEC. 9360. LOCAL PROPERTY, HOW ASSESSED.—All property, real, personal or mixed, including lands, machine and work shops, round-houses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article." (Rev. St. of Missouri, 1899, Vol. 2, Chap. 149, Art. VIII., p. 2174).

Section 9180.

"SEC. 9180. VALUATION TO BE PLACED ON PROPERTY AND ORDER OF ARRANGEMENT.—The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. Each tract of land and town lot shall be assessed and valued separately; but all land in a section and lots in a square or block, owned by one person, which are contiguous, or which can be consolidated into one tract, lot or call, shall be valued as one tract, lot or call, as contemplated in section 9168. Each kind of property shall be assessed separately from every other, except: First, the number of horses and their valuation; second, the number of mules and asses and their valuation; third, the number of cattle and their valuation; fourth, the

number of sheep and their valuation; fifth, the number of hogs and their valuation; sixth, all moneys, notes, bonds and other credits, in a separate column; but clocks, watches, carriages and household furniture, and other personal property, shall be entered in one column under the head of 'other personal property'" (R. S. of Missouri, 1899, Vol. 2, Chap. 149, Art. II., p. 2130).

Section 9127.

"SEC. 9127. DUTY OF STATE AUDITOR—PROPERTY, HOW EQUALIZED. The state auditor shall lay before the board of equalization the abstracts of all the taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the board shall classify all real estate situate in cities, towns and villages as town lots and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"FIRST—It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.

"SECOND—It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each

case to its true value." (R. S. Missouri, 1899, Vol 2, Chap. 149, Art. I., p. 2116).

Section 9228.

" SEC. 9228. SEIZURE AND SALE OF PROPERTY AFTER OCTOBER 1ST.—The collectors shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent; provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax-bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax-bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed

the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return to the collector of the county from whence said tax-bill was issued, with the money collected thereon." (R. S. of Missouri, 1899, Vol. 2, Chap. 149, Art. III., p. 2140).

Section 9197.

"SEC. 9197. COUNTY COURT TO REMEDY ERRONEOUS ASSESSMENTS. The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; and where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power, and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section" (Rev. St., 1889, Sec. 7579; R. S. Missouri, 1899, Vol. 2, Chap. 149, Art. II., p. 2134).

Laws of Missouri, 1865.

Section 5, Chapter 65, entitled "Of Telegraph Companies," Laws of Missouri 1865: "Companies organized under the provisions of this chapter, for the purpose of constructing and maintaining magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters." (Laws of 1865, p. 349).

"*Be it enacted by the General Assembly of the State of Missouri, as follows:*

"SECTION 1. The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all *quasi* public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation.

"SEC. 2. The state board of equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other *quasi* public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of 'all other property.'

"SEC. 3. There being no statute now in force expressly directing the assessment and taxation of the franchises of the corporations specified in this act, an emergency exists, and this act shall take effect and be in force from and after its passage.

"Approved March 9, 1901." (Laws of 1901, p. 232).